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SUPREME COURT. U. S.

BRIEF FOR APPELLANT AND APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 12,087

BOOMHOWER, INC.,
Plaintiff-Appellant

v.

H. G. FISCHER & CO., INC.
and
ALAN MATHIS,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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BRIEF FOR APPELLANT

STATEMENT OF FACTS

This action was brought to recover damages sustained by plaintiff resulting from,

(a) Defendant corporation's breach of contract with plaintiff whereby plaintiff was appointed the exclusive representative of defendant corporation in the distribution of defendant corporation's products in Washington, D.C., Virginia and Maryland, and was promised by defendants all possible support and cooperation, - in that defendant corporation encouraged and aided plaintiff's vice president and fiduciary in his attempt to appropriate to his own use and to embezzle plaintiff's aforesaid contract rights, and to sabotage plaintiff's employees to cease working for plaintiff and to

enter his employ individually in violation of his contract with plaintiff, in fraud of plaintiff's rights, and with the result that plaintiff's business was destroyed, to the damage of plaintiff in the sum of $36,592; and

(b) Defendants' illegal interference with, and aiding the breach by plaintiff's vice president Raney in the destruction of, Raney's contract with plaintiff to manage its business on a profit sharing basis for three years, with the result that plaintiff's business was destroyed, to plaintiff's damage in the sum of $36,592; and

(c) Defendants' trespass upon plaintiff's rights to its free enjoyment of its contract with defendant corporation and its contract with the said Raney, which was the cause of the ruination of plaintiff's business, to its damage in the sum of $36,592 (Complaint, R. 37-49).

The trial court, without jury, dictated extemporaneously its opinion, finding for defendants (App. 5-7, R. 258-261) upon which the court entered its judgment for defendants (Original Transcript of Record, App. 10) without any additional findings of facts, from which judgment this appeal is taken.

The trial court completely ignored the contractual obligation of defendants to plaintiff as matter of fact and law, defendants' tortious conduct, and the resulting ruination of plaintiff's business as a direct consequence of such breach of contract and tortious conduct.

CONCISE STATEMENT OF FACTS

(The narration of the evidence, which is incontrovertible, is contained in this statement of the facts, to avoid duplication in an appendix of all except the critical evidence.)

Plaintiff, a Delaware corporation, became engaged on October 2, 1950 in selling medical equipment in Washington, D.C., Virginia and Maryland. It was organized a few days before for that purpose,

plaintiff's president, T. G. Benton, having furnished the capital for the account of others and himself. (Tr. 212-213)

Defendant H. G. Fischer & Co., Inc. is an Illinois corporation, with principal office at Franklin Park, Illinois. Defendant Mathis is a citizen of Illinois, and was president of defendant corporation at all times involved in this action. (Complaint, R. 37, as admitted in answer, R. 50)

Defendant corporation is a manufacturer of x-ray and diathermy machines, and advertises nationally in professional magazines and by direct mail. Replies and inquiries about their products are distributed to their dealers in whose territory the inquiries originate. Defendants distributed such inquiries to plaintiff when coming from persons within its territory, but, after defendants cancelled plaintiff's Virginia territory they ceased to send plaintiff leads originating there. (Tr. 58-9)

Upon the organization of plaintiff, its Vice President (D.W. Boomhower) on October 6, 1950 wrote two letters to defendants informing them that his previously privately owned business of D.W. Boomhower Co. had been incorporated as Boomhower, Inc.; that Boomhower, Inc., had acquired all the assets of the former company including good will; that "Ed Raney will remain in full charge and there will be no material change in operational details from the past excepting - we hope expansion of our sales volume and effort"; and that the plaintiff would have as its president T.G. Benton, a business man of much experience with good banking connections and a lawyer by training. Boomhower, Inc. asked that defendants

> "write the corporation assuring"

it of the

> "continuation of our sales franchise with you and your continued support and cooperation." (Emphasis supplied)

The second letter asked that defendants' reply "assure" plaintiff of "the same dealer and cash discounts on all invoices as under the

old individual ownership' and that "all future advertising sent out by the factory for our territory be under the name of Boomhower, Inc." (App. 14, 15) ; Pl's. Ex. 27, 29, Tr. 12-15, 86, Ex. A, pp. 1 and 2 to amended complaint, R. 40-41, as admitted in defendants' answer, R. 50)

Defendants acknowledged those two letters by letter of October 12, 1950 to plaintiff reading:

> "We are interested to have your two letters of October 6th informing us of your new corporation. We would like to extend to Boomhower, Inc. our congratulations and best wishes for success.
>
> We certainly expect to extend to Boomhower, Inc. all possible support and cooperation and extend to them the same discounts and terms that we have extended to D.W. Boomhower Co." (Emphasis supplied). (App. 16, 17) ; Ex. A, p. 3 amended complaint, R. 42, as admitted in defendant's answer, R. 50; Pl's. Ex. 28, Tr. 12-15)

Defendant Mathis as President of defendant corporation was in charge of the affairs of H.G. Fischer & Co. (Tr. 7-8)

Plaintiff had, therefore, succeeded to the rights of D.W. Boomhower Co. to sell defendant corporation's products exclusively in Washington, D.C., Maryland and Virginia. (Tr. 8-9) Plaintiff would not have purchased the business "except for the Fischer line" of merchandise, having depended upon what D.W. Boomhower told it. (Tr. 208) The Fischer products represented a substantial portion of plaintiff's total sales. (Tr. 172)

Plaintiff had commenced business October 3, 1950 with paid-in cash capital of $18,500 as shown by balance sheet certified to defendants by Ed M. Raney as vice president, whose fiduciary relation to plaintiff was known to defendants upon organization of plaintiff. (Pl's. Ex. 27, attached balance sheet, Tr. 15, 18; Brown deposition, p. 5 and Brown Exhibit 18) After paying for the purchase of the predecessor business,

plaintiff had cash operating capital of approximately $4,100.00. (Tr. 199-201)

The foregoing undertakings of defendants to give plaintiff "all possible support and cooperation" were in consideration of plaintiff's undertaking as defendant corporation's distributor in the Washington area to sell their equipment, to service it (including Fischer products already sold in the area), and to take care of physicians in manner as would be a credit to all parties, - all at plaintiff's expense. (Tr. 17-18)

The foregoing exchange of letters of October 6 and 12, 1950 evidence the contractual relations of the parties hereto. They are the only writings on the subject between the parties (Tr. 16), and defendants did not ask plaintiff to sign any definitive contract until October, 1951, infra. (Tr. 17, 164-8)

Plaintiff's president had not met Mathis until November or December, 1950 and had no communication with defendants prior to acquiring the business. (Tr. 205-6)

Plaintiff was wholly unaware of any written franchise agreement between defendants and D. W. Boomhower & Co., and did not learn of the possible existence of any written franchise until 1956 upon taking of depositions in Chicago in another action. (Tr. 163-4, 208) Plaintiff's only understanding of a contract between the parties was the exchange of letters of October 6 and 12, 1950. (Tr. 164) D. W. Boomhower had merely informed plaintiff that it would be given the same discounts of 41 to 42% that he had enjoyed, and that he had the exclusive right to sell the Fischer products in Washington, Virginia and Maryland. (Tr. 209-210)

Plaintiff did not investigate the precise status of the relation between the business and the Fischer Company, relying upon the assurances of Raney and D. W. Boomhower of the exclusive right to sell their products (Tr. 205-6) and did not know whether the predecessor business was

operating under a written or oral franchise and did not investigate that question. (Tr. 296) And Brown, in charge of the records of plaintiff and the predecessor business, did not know of any written franchise agreement, nor did he ever see one, but it was common knowledge that no other dealer in the Washington area could sell the Fischer products. (Brown dep., p. 32-33)

(EXPLANATION OF SOURCE OF PROOF OF CERTAIN FACTS:

Plaintiff had called Ed Raney as an adverse witness, as an employee of defendants, and as an unwilling or hostile witness, with the right to impeach or contradict him by cross examination, pursuant to Federal Civil Rule 43, and the court noted that plaintiff may establish his relation to defendants in determining whether he was an adverse witness. (Tr. 80-82) Plaintiff showed that Raney was unwilling and hostile as shown by his attempted embezzlement of plaintiff's property rights and sabotaging of its employees, and his employment by defendant. The trial court committed gross error in not allowing plaintiff to cross examine Raney. (Tr. 84-5) Specifically, plaintiff sought to cross examine Raney in respect of his prior conflicting testimony in two actions,

(a) Boomhower, Inc. v. American Automobile Insurance Company, civil action 5366-52 in the U.S. District Court for the District of Columbia, involving plaintiff's claim under a fidelity insurance policy because of Raney's dishonest acts and plaintiff's losses (which action is still pending), the transcript having been certified by the Official Court Reporter Watson, and a copy of which was certified by the Official Court Reporter for that court as being a true copy of the original certified copy on file in that court, it having been marked in evidence as Plaintiff's Ex. No. 44; and

(b) Boomhower, Inc. v. D.W. Boomhower, civil action 1921-53 in the same court, the transcript being a duplicate original certified copy by Lucile P. Burns, Notary Public of Illinois, who recorded the deposition and certified to the same, it having been marked in evidence as Plaintiff's Ex. No. 55, Tr. 133-36, 227-30, 246-48.)

Witness Benton identified Exhibits 54 and 55 as true and correct copies of Raney's testimony in both such actions, as he was present when the testimony was given (Tr. 241-244), and plaintiff relied on Federal Civil Rules 43(a) and (d) as permitting proof of such testimony.

Plaintiff properly offered to prove that if Raney were permitted to testify as an adverse witness he would admit that he gave such testimony in those two cases, and that his testimony was correctly reported, as shown by the material portions thereof marked in bold outline on such transcripts. (Tr. 245, 252)

Plaintiff, therefore, confidently believes that he is privileged to refer to such conflicting testimony of Raney and, when doing so, for convenience will cite Raney's testimony in the American Automobile Co. case as CASE NO. 1, and his testimony in the D. W. Boomhower case as CASE NO. 2.

Upon plaintiff's acquisition of the business on October 2, 1950 Ed M. Raney became Sales Manager and Vice President for plaintiff under written contract requiring three years of service. He was entitled to a drawing account of $6,500 per year, upon his undertaking to personally make sales for plaintiff in amounts that would produce commissions to him equal to his drawing account. The contract gave him the right to one-half of the total net earnings (not to exceed $10,000 per year) with which he was permitted to purchase up to 49% of plaintiff's stock provided he remained in plaintiff's employ for three years. In signing the contract Raney acknowledged that plaintiff was purchasing the business "upon the strength of the belief that" he would "remain as sales manager." (Case No. 1, pp. 99-101) Raney approved in writing plaintiff's contract for the purchase of the predecessor business. (Raney, Tr. 99-107, Pl's. Exs. 44, 45, admitted in evidence, Tr. 102, Tr. 127-8 re Vice Presidency and General Manager) Yet, he falsely denied that he knew anything about the contract of plaintiff with D. W. Boomhower.(Ex. 54 CASE NO. 1, p. 43) Similarly in CASE NO. 2 he testified falsely that he never saw the contract. (Ex. 55, CASE NO. 2, p. 84)

Raney had expressly undertaken in writing to "report to the president of the corporation any thefts, shortages, or other irregularities immediately when they become known." So that his fiduciary relation to plaintiff had been emphasized to him. (Pl's. Ex. 46, Raney Tr. 110-112) The court did not question the genuineness of that document as signed by Raney, but doubted its materiality. (Tr. 254)

The trial court had admitted plaintiff's contract with Raney in evidence (Pl's. Ex. 44, Tr. 102-106), - and also held that plaintiff may prove Raney's employment relation to plaintiff (Tr. 80-82), but later erred grossly in declining to permit plaintiff to interrogate Raney regarding his employment relation to plaintiff. (Tr. 138) To perfect the record, plaintiff made an offer of proof of the Raney contract, stating that if plaintiff were permitted to inquire further into the contract its authenticity would be firmly established. (Benton, Tr. 248-9, 253-4) Raney freely admitted his contract with plaintiff, and that he was bound by it. (Ex. 54, pp. 41-2)

Defendant Mathis, as President of defendant corporation, knew Raney was plaintiff's vice president and fiduciary because of Raney's letters to defendants which had been signed as Vice President. (Tr. 136-7) In CASE NO. 1 Raney freely testified that Mathis knew substantially the arrangements he had made with plaintiff. (Ex. 54, pp. 90-92)

Defendants knew that plaintiff's president was inexperienced in the medical equipment business, that Raney had been engaged for a three-year term as plaintiff's vice president and Sales Manager on a drawing account with an interest in the profits of the business, and Mathis had stated to plaintiff that it could rely on Raney. (Tr. 185)

Plaintiff's president, Benton, had confidence in Raney. Defendants' products handled by plaintiff represented a substantial percentage of its total sales. (Tr. 172-3) Defendants' products represented the most

important line of merchandise that plaintiff sold, and the business had held the franchise as early as 1946. (Brown deposition, pp. 31-32)

Brown, who controlled the records of plaintiff's business, knew that the Fischer franchise "supplied a substantial part of the profit realized in the operation of the business and I would say that the loss of any part of the franchise or all of it would certainly have been to the detriment of the business." He knew that the leads to customers obtained by Fischer from its advertising and supplied to plaintiff were important. (Brown deposition, pp. 33-34)

Raney was a good technical man in the medical equipment business, and defendants looked upon him as the officer of plaintiff who knew most about the sale of the Fischer products. (Tr. 60-61) He had been in the medical equipment business all his life. (Tr. 83) (Brown deposition, p. 29)

Plaintiff's business got off to a fine start in the fall of 1950. Plaintiff's president sought defendants' "support and cooperation" at all times, his letter to defendants of March 3, 1951 stating:

> "Please be assured that your guidance and help will be at all times very deeply appreciated." (Emphasis supplied) (Pl's. Exs. 42, 35, Tr. 32-3, 38)

Defendant corporation expressed appreciation for a "fine order for six Spacesaver 30 units" (x-ray machines) on October 17, 1950. (Pl's. Ex. 42, Tr. 168-9)

Plaintiff had sold at least 12 Fischer x-ray machines from January 11, to April 2, 1951. (Brown deposition, pp. 34-37, Ex. 26)

Defendant Mathis had entertained plaintiff's president at dinner in Washington, D.C. in January or February, 1951, and they had met with Raney at the Columbia Country Club in Chevy Chase, Maryland later in the early part of 1951, when there was no discussion of Raney's purpose to appropriate plaintiff's Fischer franchise. (Tr. 36-7)

But, as early as January, 1951 - four months after plaintiff's organization, Raney, plaintiff's vice president, was laying the groundwork for appropriating to his own use plaintiff's franchise rights with the Fischer Co. for the Washington area. He was then in Chicago on plaintiff's business and at its expense, and while there, "intimated" to defendant Mathis

> "That the situation here (in Washington) might not be entirely satisfactory and at that time asked you (Mathis) about the possibility of taking over the Fischer (franchise) exclusively in this area." (Emphasis supplied) (Pl's. Ex. 30, undated clandestine letter to defendants, written from his residence in Washington in March, 1950, Tr. 23, App. 18 ; Mathis, Tr. 20-25, Raney Tr. 87-9)

By that letter, written in March, 1951, Raney sought to sabotage plaintiff's relations with defendants. Raney asked defendants to give plaintiff's Washington franchise to him individually and "TAKE IT AWAY FROM THIS ARRANGEMENT AS OF THE PRESENT" (with plaintiff), and requested defendants to reply to him secretly at his residence. He stated that he had the "capital available to handle the deal here on a dealer basis and can carry on in exactly the same manner as we have in the past" (Tr. 40-41). He freely admitted that before writing such letter he had "very definitely" determined to quit, and then testified, falsely, that he had not theretofore been in communication with defendants regarding his dissatisfaction with his employment in Washington or his discussions with Mathis about his desire to obtain the Washington franchise, - when he had done so in January, 1951 as above noted. (Tr. 123, 87-88)

In CASE NO. 1 Raney denied that he had sought to obtain the Fischer franchise possessed by plaintiff, while a vice president of plaintiff, thus perjuring himself. He declared that he had written Mathis asking if there were any open territories, and that Mathis had mentioned Arizona, New Mexico, Cincinnati and Ohio. He testified that Mathis "ALSO

TENDERED TO ME VOLUNTARILY, IF I WAS LEAVING BOOMHOWER, HOW ABOUT CONSIDERING THE WASHINGTON TERRITORY". (CASE NO. 1, Ex. 54, p. 24-25, 94)

Raney again attributed to defendant Mathis the responsibility for offering the Washington franchise to him, as follows:

> "A. He offered me at that time the choice of territories, Arizona, New Mexico, or Cincinnati, which he wrote, and then made the statement as I recall it, if you are going to leave Boomhower, how about considering the Washington area." (CASE NO. 1, Ex. 54, pp. 37-8)

Raney declared emphatically that he never attempted while working with Boomhower, Inc. on his own to acquire that franchise for himself, the Washington area, saying:

> "Definitely not. It was tendered to me by the Fischer Company when I made application for any open territory they might have." (CASE NO. 1, Ex. 54, pp. 92-4, 138-9)

While his thrice repeated statement that Mathis voluntarily tendered him the Washington franchise might be true (and stands uncontradicted), his denial that he also sought to acquire the franchise is absolutely false as shown by his undated letter of March, 1951 and later letters to Mathis and to D. W. Boomhower, infra.

In this action, he denied that he ever wrote Mathis asking what territories for the Fischer franchise were available. (Tr. 113) After this action had been commenced, and when he testified in Chicago in CASE NO. 2 when in defendants' employ and interested in protecting defendants, he denied that defendants initiated the suggestion that he take the Washington franchise, and falsely denied that he had testified in CASE NO. 1 that Mathis voluntarily tendered the franchise to him. (Ex. 55, pp. 76-7)

Raney admitted freely that the basis for his statement in his March, 1951 letter to Mathis that he had "capital available to handle the

deal here on a dealer basis" was that Dennis Kane (plaintiff's other principal employee) "gave him reason to think that he would have it." (CASE NO. 2, Ex. 55, p. 75). He admitted that he exhibited part of his secret correspondence with Mathis to Kane (Ex. 54, p. 26-27); yet he denied that he had asked Kane to go to work for him (Ex. 54, p. 27), and in CASE NO. 2 he declared, in respect of whether he had sought plaintiff's employees to go to work for him, "Kane was the only one that was in on that, to my knowledge." (Ex. 55, p. 104). The statement is completely false, for his secret correspondence with Mathis and D. W. Boomhower, infra, show that he knew that he could take substantially all plaintiff's employees with him. He testified that every employee knew of the circumstances; that everybody discussed the circumstances. (Ex. 54, p. 44)

Raney had testified that Kane was "involved in the whole picture until he (Kane) decided that he could replace" Raney as vice president in the business. (CASE NO. 2, Ex. 55, p. 75) He freely admitted that Kane had agreed to finance him after March 15, 1951 but that Kane double crossed him and "squealed" on him and informed plaintiff of Raney's purposes, for which he upbraided Kane. (Ex. 55, p. 108-109) But in CASE NO. 1 he falsely denied that he reprimanded Kane for squealing on him. (Ex. 54, p. 44) And in CASE NO. 1 he falsely denied that he ever conspired with Kane during his employment by plaintiff to obtain the Fischer franchise. (Ex. 54, pp. 149-150) In CASE NO. 2 he declared that Kane had agreed before March 15, 1951 to finance him, and later double crossed him. (Ex. 55, p. 105)

Defendants on March 27, 1951 wrote Raney at his residence, in reply to Raney's above noted undated letter of March, 1951:

> " * * * We, of course, are agreeable to turning our representation over to you. * * We will be ready to proceed along the lines under discussion when we have heard further from you." (Pl's. Ex. 31, Tr. 23, App. 20)

While employed by plaintiff from October 2, 1950 through April 10, 1951, Raney had failed to personally make sales of products upon which his commission would equal the drawing account he received weekly, as required by his contract. An analysis of his earned commissions by bookkeeper Churchill, made in the usual course of business, showed that during his six months' service his earned commissions were only $1442.60, compared with the requirements of his drawing account of $3250 for that period, a deficiency of almost $1800. (Rickman, deposition, pp. 13-18, Rickman Ex. 15) But he contended as a witness, falsely, and in contradiction of the clear terms of his written contract, that the payments to him were a salary (Tr. 119, Pl's. Ex. 44); but later on the same day admitted, correctly, that his weekly check was a drawing account as stated in his contract with plaintiff. (Tr. 138) In CASE NO. 1 he also had declared, falsely, that the payments were a salary. (Ex. 54, p. 138) He had instructed bookkeeper Brown to mark them as "salary" commencing in February, 1951 (for the obvious reason that he knew that he was not earning his drawing account as required, and thus sought to escape liability for the deficiency). (Brown deposition, pp. 19-21, Brown Ex. 24)

The proof is positive that Raney was on a drawing account, and not on a salary. (See weekly checks signed by Raney, Pl's. Ex. 52, Tr. 138-141, Ex. 24 Brown deposition.) Yet he caused some of the checks to be marked "salary" commencing in February, 1951 without plaintiff's knowledge, when he well knew that he was not earning his weekly drawing account. Such checks were signed only by him and bookkeeper Brown. (Tr. 138-141; 193-4)

The deposition of Howard Lox was read into evidence without objection. In substance, he testified: He is a drug salesman at Roanoke, Virginia, but in 1950 and 1951 he was a salesman of medical equipment, engaged as a 25% partner of the Virginia Medical Equipment Company with Al Otteson, and cooperated in that work with plaintiff in the sale

of its products. He sold for plaintiff and himself the products of H. G. Fischer & Co., Inc. in Virginia as supplied by plaintiff. Plaintiff had the Fischer and other franchises in Virginia which products they wanted to sell and plaintiff made delivery of products to them. He conducted that business with plaintiff through Ed Raney as vice president of plaintiff, and T. G. Benton as president. He sold a Fischer x-ray machine to Dr. Brown in Virginia in February or March, 1951, and on March 15, 1951 personally installed the machine with Ed Raney.

Prior to that time he had been offered a position with plaintiff in Washington when he was there for that purpose, and accepted the position, promising plaintiff's president, in the presence of Ed Raney, that he would report to work in two weeks. (Deposition; also Benton, Tr. 190) Lox and Benton had a handshake on the mutual promises, in the presence of Raney when the position and terms thereof were stated by plaintiff's president.

Raney admitted in CASE NO. 1 his knowledge that plaintiff had engaged Lox as a salesman and had a handshake thereon (Ex. 54, pp. 45-6, 127), but in CASE NO. 2 he falsely denied that he knew that plaintiff wanted Lox as a salesman, and that plaintiff had so engaged him. (Ex. 55, pp. 96, 99)

Thereafter Mr. Lox declined to go to work for plaintiff because, during Raney's visit to Virginia for the installation of Dr. Cox's x-ray machine, Raney in violation of his duties to plaintiff, informed him that plaintiff was not in good shape, that it would soon fold up or go broke, and that Raney could personally get the Fischer franchise for the Washington and Virginia areas and had been promised it. Lox believed such statements. Raney asked him and his partner, Otteson, to go to work for him personally when he could get the Fischer franchise, to which purpose Lox said he would consider.

Raney freely admitted that he could keep the Roanoke man, Lox, and Otteson as his employees when he should take the franchise from

plaintiff (Tr. 91-2), thus confirming Lox's testimony.

Lox reported to Otteson what Raney had said, and they thereupon flew to Chicago to get the Fischer franchise for themselves, which they did in March or early April, 1951; and they got it for themselves to the exclusion of plaintiff, without reporting it to plaintiff; and in doing so they reported to defendants the alleged facts stated to Lox by Raney about the plaintiff, to plaintiff's great prejudice. The Virginia franchise was thereupon taken away from plaintiff, as hereinafter noted.

Raney did not, of course, report his clandestine acts to plaintiff, or his own "irregularity" and breach of trust in sabotaging Lox's employment by plaintiff, and in disclosing facts that lead directly to plaintiff's loss of the Virginia franchise, as he was bound to do by every rule of decency, and by his written undertaking so to do as plaintiff's fiduciary. (Pl's. Ex. 46, Raney Tr. 110-113)

Of plaintiff's billed sales of 9 Fischer x-ray machines from Jan. 11, 1951 to April 2, 1951, two of them had been sold by its Virginia representatives inia Medical Equipment Company, amounting to about one-fourth aintiff's business. (Brown, p. 37, Brown Ex. 37)

Raney confessed that he had made up his mind in the second week of March, 1951 to leave plaintiff but, while wanting to be fired, wanted to wait for six months from October 2, 1950 to expire, so as to avoid special liability to plaintiff. (Ex. 54, pp. 105-6) But, in CASE NO. 2 he testified: "I didn't desire to be fired." (Ex. 55, p. 109)

Raney's letter of March, 1951 to defendants stating that he had the capital available to handle the Washington franchise, supra, was based on his arrangement with Dennis Kane (another of plaintiff's principal employees), who had agreed to go to work for Raney and to finance Raney's operation. (Tr. 93) Kane knew about Raney's clandestine correspondence with Mathis, and that he could finance its operation if Raney could get it. (Tr. 142) Raney testified that Kane did not "go

through with it", but that Kane had "squealed" on Raney's purposes, and that, after squealing on Raney, plaintiff engaged Kane as his successor sometime after March 15, 1951. (Tr. 94-96)

The facts are that plaintiff had not confronted Raney with knowledge of his infidelity until April 4 or 5, 1951, infra.

The "squealing" by Kane on Raney, and Kane's determination not to finance Raney was the reason for Raney's letter of April 1, 1951 to D.W. Boomhower, requesting $5,000, infra.

Thereafter, Raney replied from his residence on March 31, 1951 to Mathis' letter of March 27, 1951 noted above, telling defendants he could take plaintiff's Roanoke and Richmond, Va. men (Lox and Otteson), and asking how much time defendants would require to notify plaintiff of the change, stating:

> "I certainly do not wish it to be said at any time that there was any 'SCULLDUGGERY' in the transaction"

in manifest recognition of his guilt. By "scullduggery" he testified he "meant something wrong." (Tr. 90; Pl's. Ex. 32, Tr. 23, App. ; Raney Tr. 89-90)

Despite such positive knowledge to him, Mathis attempted to deny that he knew that Raney could take with him plaintiff's employees.

Brown, bookkeeper-comptroller for plaintiff, was the officer in charge (Tr. 40) for plaintiff of its records. During his employment of six months for plaintiff ending late in April, 1951, he never saw the confidential correspondence between Raney and Mathis. (Brown deposition, pp. 21-24) He had no knowledge of Raney's efforts to obtain the Washington franchise until after plaintiff ascertained the fact. He had never seen the clandestine correspondence. (Brown deposition, pp. 24-27)

Raney testified that if defendants gave plaintiff only one or two weeks notice of their termination of the franchise, it would relieve

his wrongful conduct of "all wrongdoing" because he claimed at that time, in March, 1951 he and plaintiff had "come to the end of the road" (Tr. 91), whereas plaintiff had not even learned of Raney's attempted embezzlement of the franchise until April, and Raney did not resign until April 11, 1951 (Pl's. Ex. 49-50, Raney Tr. 97, 117-118).

Plaintiff learned of Raney's infidelity on April 4, 1951 when its president confronted him with such knowledge, demanded that he exhibit his clandestine correspondence which Raney refused to do, and demanded that he turn in his keys. (Raney, Tr. 96, 175, 202-3, 210) Plaintiff had no reason theretofore to suspect wrongdoing in its organization, and had been highly impressed by Raney's ability. (Tr. 178)

Raney then testified, falsely, that his private correspondence with defendants did not affect the business of plaintiff, in refusing to exhibit it to plaintiff. But, after plaintiff's president put in a long distance phone call to Mathis at Chicago to ascertain the real facts, and before the call was completed and then cancelled, Raney admitted that he had sought to acquire the Washington franchise. (Tr. 175, 184) Raney claimed that his private correspondence had been sent to California, but promised to retrieve it and exhibit it, but never did so. (Tr. 176) In CASE NO. 1 he testified contrarily that such correspondence never left his hands; and that, in stating to plaintiff's president that he had sent the correspondence to California, he had lied. (Ex. 54, pp. 23-4) And in CASE NO. 2 he retracted, and admitted that he had sent the correspondence to a Mr. Brooks in California. (Ex. 55, pp. 107-8)

Raney had, on April 1, 1951 - again from his residence and clandestinely - written his friend, D.W. Boomhower, plaintiff's predecessor, asking for $5,000, enclosing defendants' letter of March 27, 1951 as showing the ground-work he had laid for embezzling plaintiff's Fischer franchise, and stating that he could take plaintiff's employees Holah, Cissel and Kane, as well as Lox from Roanoke-Richmond area. (Pl's. Ex. 48, App. 25, Raney Tr. 98; Tr. 68, 115-117). Plaintiff made

an offer of proof that if Raney were to be permitted to be cross examined as a witness he would concede his admissions of facts in that letter. (Tr. 255)

Despite such positive proof, Raney insisted in CASE NO. 1 that he never told anyone that he planned to take the Fischer franchise "at any time anywhere". (CASE NO. 1, Ex. 54, pp. 126-7)

In CASE NO. 1 Raney brazenly denied, falsely, that he attempted to raise capital or that he asked D.W. Boomhower for a loan of $5,000. He said "I CERTAINLY DENY IT UNDER OATH"; also that "I DID NOT WRITE BOOMHOWER ASKING FOR MONEY TO OPEN IN WASHINGTON AND TAKE THE FISCHER FRANCHISE AWAY FROM BENTON"; also that it "IS ABSOLUTELY CORRECT" that he had no desire or that he did not ask anyone for that financing of him in a business in Washington or in Baltimore, - "definitely, no." (Ex. 54, pp. 21-22, 23, 97-9, 103-4, 179). He falsely testified further: "That I did not write Boomhower, asking for money to open in Washington, D.C. and take the Fischer franchise away from Benton." (Ex. 54, p. 89-90)

He further testified falsely in CASE NO. 1 that he did not send copies of his correspondence with Mathis to D.W. Boomhower, and that he had written D.W. Boomhower because Fischer had offered him the New Mexico franchise. (Ex. 54, p. 32-33, 97-99, 125) And later he confessed in CASE NO. 2 that he had fully informed D.W. Boomhower of his plan to take the Washington franchise and asked for $5,000 for operating that franchise. (Ex. 55, pp. 100-101, 106-7)

But in CASE NO. 1 he emphatically testified that he did not ask D.W. Boomhower for $5,000. - "I certainly deny that under oath", which is false as shown by his letter of April 1 to D.W. Boomhower. (Ex. 54, p. 22) He was so brazen as to testify perjuriously that "it is absolutely correct" that "he did not desire or that you did not ask anyone for the financing of you in a business in Washington or in Baltimore." (Ex. 54, p. 23)

On April 5, 1951 plaintiff's president, having just learned of Raney's clandestine efforts to appropriate to his own use plaintiff's franchise, talked with defendants on long distance telephone, and on the same date wrote defendants an optimistic letter about plaintiff's business and the sales it had made during the first six months' life, about plaintiff's efforts to aid its Virginia representatives, Lox and Otteson, and inviting defendants' "SUGGESTIONS IN ANY RESPECT WHATSOEVER" and assuring defendants that he would "PERSONALLY SEE TO IT THAT THEY ARE GIVEN IMMEDIATE ATTENTION". (Pl's. Ex. 36, Tr. 32-3). Plaintiff was obviously striving to offset any prejudice Raney caused it by his conduct, and to avoid the loss of its franchise. Mathis in the telephone conversation promised plaintiff that he would soon be in Washington and promised to confer with plaintiff's president, but there was no discussion of Raney's efforts to obtain the Washington franchise for himself, and Mathis did not inform plaintiff thereof. (Tr. 188) Despite such letter of April 5, 1951, defendant Mathis was not refreshed in his recollection thereof. (Tr. 45)

The same date, April 5, 1951, after plaintiff's president had confronted Raney with knowledge of his efforts to appropriate to his own use the Washington franchise (Tr. 96), Raney wrote defendants, after having learned in some unknown way of plaintiff's letter to defendants of that date, belittling Dennis Kane, and saying:

> "Ordinarily, Allan, I would not stoop to leveling on a man but in this case he and Benton feel that they can put one over on PAPPY but he has lived too long for that."

He implored defendants "to respect all of our correspondence as confidential and not open to the scrutiny of others. If Benton requests copies please consider the confidential nature of my letters - at least - and refuse him."

In that April 5 letter Raney expressly informed defendants:

> "My reason for all of the foregoing is that I worked under a written agreement with Benton on a profit sharing arrangement, and I do not propose to let him in his sly legal way try to chisel me out of my just earnings on a technicality." (App. 23 , Pl's. Ex. 33, Tr. 23)

The last clause is false, as he admitted on oath that he had failed to personally make sales of products upon which his commissions would equal the drawing account he actually received, as required by his contract. (Tr. 119, 138, Pl's. Ex. 44). There is not a scintilla of evidence that plaintiff misconducted the business, or that could conceivably excuse the fraudulent purposes of Raney.

In CASE NO. 1 Raney falsely testified that his correspondence with Mathis "had relation to my going to work for the Fischer Company", - meaning the job that he ultimately took as assistant to Mathis, (Ex. 54, p. 21), whereas the correspondence showed his definite purposes to embezzle plaintiff's franchise.

Mathis freely admitted his knowledge in early April, at least, of Raney's interest in plaintiff's profits. (Tr. 37) It increased his overall knowledge of Raney's fiduciary relations to plaintiff.

Raney's testimony in CASE NO. 1, on two occasions, that he had no written communication with Mathis between April 4, 1951 and April 12 (when he saw Mathis in Washington), is absolutely false. (Case No. 1, Ex. 54, p. 38, as witness his foregoing letter of April 5 to Mathis and Mathis' reply of April 9, 1951, infra.)

Raney further testified falsely that he had not informed Mathis of substantially the arrangements he had under contract with plaintiff, and that Mathis did not know anything about such terms until his deposition was taken in Chicago in the action of Boomhower, Inc. v. D.W. Boomhower. (Tr. 136-7; see transcript of depositions of Raney and Mathis in that action taken January 12, 1956, Pl's. Ex. 55.) But, in CASE NO. 1, Raney freely confessed that Mathis knew the arrangements he had made with plaintiff. (Ex. 54, pp. 90-92)

Raney resigned from plaintiff's employment as Vice President after plaintiff had demanded that he reveal to plaintiff his private correspondence with defendants which he refused to do whereupon plaintiff properly requested that he turn in the keys to the store on April 4, 1951. While dated April 10, his resignation was not mailed until April 11, 1951. (Tr. 123-4, 127-8, 177; Pl's. Exs. 49-50, 210-11). Yet he claimed that he had been fired. (Tr. 90)

He testified that Mrs. Raney had thrown away his private correspondence with Mathis, and he had refused to reveal it to plaintiff on the ground that "it was personal correspondence." (Tr. 143)

In CASE NO. 1 Raney had the audacity to testify that the correspondence did not concern Benton or Boomhower, Inc., which is absolutely false. (Case No. 1, Ex. 54, p. 20-21). His testimony in Case No. 1 that there was nothing in the correspondence that was damaging to plaintiff is equally false. (Case No. 1, Ex. 54, p. 25). His testimony in Case No. 1 that "there was nothing to conceal" in the correspondence is brazenly false. (Ex. 54, p. 44-45) He testified that he had done a fine job for plaintiff in his six months' service, despite the fact that in the fourth month, January, 1951 he had sought to embezzle plaintiff's franchise. (Ex. 54, p. 43)

Plaintiff attempted to discover the clandestine correspondence between Raney and Mathis, but was unable to do so until January, 1956 when Mathis produced it pursuant to subpoena issued in the action of Boomhower, Inc. v. D.W. Boomhower (Pl's. Ex. 55, Tr. 192). That was the first time that plaintiff knew the real substance of that correspondence, and the deliberate purposes of defendants as shown by their conspiracy with Raney. (Tr. 193, 203)

Plaintiff had been in such great need of sales power that, despite its knowledge of Raney's infidelity, plaintiff offered Raney a position as a salesman on or about April 7, 1951, under a particular contract which Raney signed, but did not deliver. (Tr. 124-6, 176-7, 204-5;

Raney, Case No. 1) Plaintiff had been "frantic for salesmen". (Ex. 54, Raney, p. 126) That offer was made in the hope of saving and continuing the business. (Tr. 183)

After learning of Raney's attempted embezzlement of plaintiff's franchise, plaintiff investigated, found the ultimate fact of his attempted embezzlement without learning of the participation of defendants therein, found that he had not earned his drawing account (Brown deposition, Brown Ex. 22), and found that Raney had contributed to the preparation of a profit and loss statement for the first three months of plaintiff's life ended December 31, 1950 which had actually included expected profit from unbilled and undelivered sales contrary to the uniform practice, in an endeavor to show plaintiff's president a profit from operations which was false. (Tr. 179, 183) Having thus believed as of January 1, 1951 that the business was profitable, plaintiff moved to a larger and more expensive place of business in Washington. (Tr. 192)

Raney testified falsely that the statements did not include expected income on uncompleted sales (Tr. 115, Case No. 1, pp. 57-59, 63, 80; Case No. 2, pp. 92-95) Bookkeeper Brown worked under Raney's immediate supervision in the absence of plaintiff's president (Brown deposition p. 4, Case No. 1, Ex. 54, p. 50), but in this action Raney falsely denied that he had any supervision over Brown. (Tr. 114) Under Raney's supervision, Brown had informed plaintiff that the profit for the three months ended December 31, 1950 and for January and February, 1951 did not include expected profit on unbilled and undelivered sales, thus leading plaintiff to believe that the business was much more profitable than it was; and plaintiff did not discover the bookkeeping juggling until after Raney quit, and on April 17, 1951 when Brown confessed to plaintiff in writing. (Brown deposition, pp. 6-14, Brown Exs. 19, 20, 21)

With full knowledge of Raney's ficudiary obligations to plaintiff as its vice president, and of his profit sharing arrangement with plaintiff and his commitment to remain for three years, defendants by letter of

April 9, 1951 re-affirmed their purpose to give Raney plaintiff's franchise for the Washington area as outlined in their letter of March 27, 1951, the fact that defendants would give plaintiff one month's notice of the change, and that they would consider $40,000 of business per year a satisfactory volume. (Pl's. Ex. 34, Tr. 23; App. 24)

Such re-affirmation of April 9, 1951 was sent by defendants to Raney despite the fact that defendants had received plaintiff's letter of April 5, 1951 at 9:35 A.M. on April 9. (Tr. 46)

Defendant Mathis assumed full responsibility for the foregoing exhibits 30, 31, 32, 33 and 34. (Tr. 24)

Despite the expressed determination of defendants to give the Washington franchise to plaintiff's fiduciary Raney, and their offer to do so, Mathis attempted to excuse his participation in such purpose with Raney by the alibi that such determination was conditional upon the facts about plaintiff as reported by Raney being true. (Tr. 39, 45, 62-3, 67)

Such alibi is proved to be false by the showing hereinafter that defendants never investigated or inquired about such facts, and that they did not know whether the forebodings of Raney about plaintiff would transpire. (Tr. 40) The facts are that plaintiff's business did not actually disintegrate for some months, following its sufferings after plaintiff had lost Raney and Kane as its successive, dishonest vice presidents. (Tr. 44)

Defendants did not at any time report the foregoing clandestine correspondence and purposes of Raney to plaintiff. They did not independently investigate the alleged facts about plaintiff as stated in Raney's letters, and did not know whether any of the alleged facts about plaintiff as stated in Raney's letters were true. (Tr. 25, 43-4)

Defendants freely admitted that up until April 9, 1951 while plaintiff was distributing and servicing defendants' products they did not have

any complaint of such a severe nature "that would cause" them "to take any action" as against plaintiff, and that they did not recall any complaint of any nature as against plaintiff. (Tr. 29-30) There is no evidence whatever that plaintiff was mismanaging the business, as Raney had asserted as the alibi for his acts, and Mathis did not indicate to plaintiff any dissatisfaction whatever. (Tr. 189)

In fact plaintiff had purchased from defendants in the second quarter of 1951 $13,322.70 of medical equipment at cost, being the largest purchase by the business for any three months from January 1, 1945 through June 30, 1952, with only one exception. (Pl's. Ex. 53, Tr. 63-5) In the first quarter of 1951 it had purchased $9.558, and in the third quarter of 1951 $6,691, - all at a discount of 42%. (Tr. 171)

Defendants knew well that Raney wanted his correspondence with them kept confidential, and defendants complied by addressing their letters to Raney at his residence. Mathis testified that he paid "much attention" to the fact that the correspondence was addressed from and to Raney's residence. (Tr. 21) And, despite such admission, Mathis testified that such fact did not impress him. (Tr. 22)

Mathis further testified that Raney's written statement to him that "he did not want anything to be considered 'SCULLDUGGERY' in his plans" did not impress him, that "it just meant that he did not want it advertised", thus endeavoring to avoid scienter to him of Raney's wrong purposes and defendants' willing participation therein. (Tr. 22)

Defendant Mathis freely admitted that Raney's letters speak for themselves, and that he knew that Raney sought to obtain the Washington franchise for "his own personal use", and that Raney would take with him plaintiff's employees. (Tr. 26-8 30-31)

Plaintiff had no knowledge or reason through March, 1951 to believe that the Fischer Company would cancel its franchise for Virginia, and did not learn of it until it received Fischer's letter of April 9, 1951. (Tr. 191-2)

Plaintiff's aforesaid letters of March 3, 1951 and April 5, 1951 bore the time stamp of their receipt by defendants; but the aforesaid three clandestine letters by Raney to defendants did not bear the usual time stamp, thus showing the desire of defendants to regard them as unusual and private, clandestine communications. (Pl's. Exs. 30, 32, 33, Tr. 33-4)

Despite Mathis' knowledge of Raney's wrongful purposes, and defendants' assurance to plaintiff by their letter of October 12, 1950 of " all possible support and cooperation", Mathis testified that he was under no obligation to bring to plaintiff's attention the fact that Raney was secretly engaging in acquiring plaintiff's principal property, the Fischer franchise for the Washington area. (Tr. 53)

At all times during its limited life, plaintiff was in critical need of additional salesmen, so that any loss of important personnel or exclusive sales territory would have been extremely hurtful to its business. (Raney, Tr. 118-119)

Brown, who had been the bookkeeper-comptroller of the business for several years, felt that Raney was the ablest known person to run the business, informed plaintiff that "he had no other man available who could do as good a job for the company as" he "felt Mr. Raney could" - but Brown had not known of Raney's complete infidelity. (Brown deposition, p. 29-30)

Despite defendants' commitments to plaintiff to extend it "all POSSIBLE SUPPORT AND COOPERATION", and its full knowledge of Raney's infidelity, and without in any respect consulting plaintiff, defendants by letter of April 9, 1957 withdrew from plaintiff its exclusive right to sell its products in substantially the whole State of Virginia. (Pl's. Ex. 43, Mathis Tr. 47) The same date, April 9, 1951, Mathis wrote Raney confidentially confirming his purpose to give Raney plaintiff's franchise for the Washington area. (Pl's. Ex. 34, Tr. 48)

Plaintiff's letter of May 2, 1951 to defendants showed its efforts to increase its business, as did its letter of April 5, 1951, and noted

> "facts of occurrence in the past few months which would be of real interest to you"

and asked for a meeting with Mathis the next time he was in Washington. It was obviously the conduct of Raney that plaintiff wished to discuss and learn more about (Pl's. Ex. 39), and it is abundantly apparent that plaintiff did not know what part defendants had played in aid of Raney's infidelity.

Plaintiff pleaded with defendants by letter of May 5, 1951 to continue its franchise in certain counties in Virginia which had been worked by its salesman, Holah (Pl's. Ex. 37), but defendants insisted on awarding all such counties exclusively to Virginia Medical Equipment Company, plaintiff's former sales agency in Virginia. (Pl's. Ex. 38, letter of May 21, 1951)

Mathis had not even informed plaintiff that the Virginia territory had been awarded to the Virginia Medical Equipment Company until his letter of May 21, 1951. (Pl's. Ex. 38)

But Mathis had awarded the Virginia territory to the Virginia Medical Equipment Company in late March, 1951 when Lox and Otteson went to Chicago for the purpose, - following Raney's efforts to get Lox and Otteson to work for him when he should get that franchise. (See summary of Lox's testimony, supra). Mathis admitted that before April 9, 1951 Lox and Otteson had conferred with him in Chicago, and that he had then given the Virginia franchise to them. (Tr. 48-50)

On April 13, 1951 Raney accepted Mathis' invitation to accept a position with Fischer & Co. in Illinois, and commenced work April 16, 1951. (Tr. 89-90, 213-14) Mathis had been in Washington on April 12, 1951 and sought to confer with Raney and did so, without asking to meet with plaintiff's president. His alibi for seeing Raney was that "he was supposed to be the man in charge", - thus again concealing from

plaintiff his illegal and clandestine conspiracy with Raney whom he knew so well as plaintiff's fiduciary, and when it was his contractual, and moral duty to affirmatively reveal the real facts of Raney's treachery to plaintiff.

Raney's work with the Fischer & Co. is as a field engineer, and he is known as the "dealers' aid department." (Tr. 144, 83)

Raney had not actually received the franchise for the Washington area because he found that he could not finance it, having been double-crossed by plaintiff's other employee Kane - Raney's co-conspirator in attempting to embezzle the business - and who, instead of furnishing the funds for the purpose, reported to plaintiff Raney's infidelity. The reason for the failure of the conspiracy of Raney-Kane was doubtless the fact that Kane insisted on one-half the profits as noted by Raney in his clandestine letter to D.W. Boomhower of April 1, 1951 (Pl's. Ex. 48), when he reported:

> "I want to be in a position to work on a dealer basis and it takes capital which I do not have. I can get some of it from other sources but - as usual - they want 50% of the profits. Money is not worth that. In other words I am not going to carry along a lot of dead horses just to get started."

D.W. Boomhower would not advance him the money; hence Raney's plans were thwarted, first by his co-conspirator Kane, and secondly by his friend Boomhower. But the harm had been done. The Virginia territory was taken from plaintiff by reason of Raney's infidelity. The infidelity of Raney caused the loss of his management. The affirmative cooperation of defendants with Raney, in breach of their undertaking to give all possible "SUPPORT AND COOPERATION" to plaintiff, and their tortious conduct in aiding and abetting Raney in his infidelity, had taken their toll. Plaintiff was desperate, with one third of its exclusive territory gone, its management was gone, and, in desperation, it was required to engage Kane as its manager who had been clandestinely Raney's conspirator without plaintiff's knowledge, and he too resigned July 27, 1951

following his dishonest conduct. Such facts are the sole cause of the ruination of plaintiff's business, and its tremendous loss, as shall be shown hereinafter.

Following the discovery of Raney's dishonest conduct, plaintiff caused an independent audit to be made of its affairs for the period October 3, 1950 through March 31, 1951 by certified public accountants, James H. Rees & Co. (Brown deposition, pp. 59, 71-2, Brown Ex. 25), which shows that, instead of earning money as Raney had reported, plaintiff had actually suffered a net loss of $3,265.98; also that plaintiff's officer, Benton, had had to advance to plaintiff the sum of $10,000 in addition to the cash capital of $18,500 with which plaintiff commenced business six months before; and plaintiff carried amongst its assets a receivable of $2,274.64 representing the excess of Raney's drawing account over his earnings-commissions which, of course, was never to be collected. (Brown deposition, Ex. 25, p. 3) The net effect thereof is that plaintiff suffered a realistic loss in those three months of $5,540.62, as the item due from Raney was never to be collectible.

When Raney resigned, plaintiff had no alternative to engaging Kane suddenly to take charge of the business, as Vice President, "not knowing that Mr. Kane" (the witness was about to say that he then did not know that Kane had conspired with Raney to finance Raney's operation under plaintiff's franchise which he tried to embezzle, but the court sustained an objection, in error). (Tr. 183-4)

Kane served as plaintiff's vice president from April through only July 27, 1951 (Tr. 189-190), and was immediately in charge of the business in the absence of plaintiff's president. (Churchill deposition, p. 6) Churchill was bookkeeper for plaintiff from June, 1951 through August, 1952 (Churchill deposition, p. 3-4), and at the date of his testimony was a certified public accountant. (Dep. 24)

After plaintiff lost Raney because of his infidelity, plaintiff endeavored to sell the business, attempting continuously thereafter to do

so by advertising. Meantime, plaintiff sought desperately to maintain sales and to make money, as shown by the letters to Mathis, supra. (Tr. 195-6)

Following Kane's resignation when his position remained untenable by reason of his dishonest acts, plaintiff was required to rely upon Holah, one of its salesman, as manager in August, 1951, but was required to pay him a salary and, after he was unsuccessful, plaintiff hired in desperation to keep the business alive another of its salesmen, one Cissel to conduct the business, which was wholly unsuccessful. (Tr. 190-191)

Walter Miller who worked for plaintiff from the first part of 1951 through late in 1951 testified, when refreshed by a letter he wrote to plaintiff of July 29, 1951 that just before he entered plaintiff's employ "that the Fischer franchise in the Washington area could be obtained by Mr. Kane," but he could not recall who so informed him. (Miller written interrogatories Nos. 1-3). He testified that he could not recall the answers to the many questions, but specifically referred to his current declarations in writing of July 29, 1951 as answers to his further questions 4 through 17. He then declared that Kane headed a group of two doctors who would finance the new organization; that Mr. Mathis had arranged an appointment with Kane at the time Mathis had last contemplated a visit to Washington, which visit he cancelled.

Kane, - Raney's co-conspirator - confessed to Miller that he had been wholly responsible for the gradual ouster of Mr. Rarey as an official of the Boomhower Co., and that it was his intention of solidifying himself in that position occupied by Raney.

Miller also stated that Kane confessed to him that "he had several x-ray deals that could be consummated - yet they were held in a state of non-closure in order that a satisfactory connection with another equipment house might be negotiated by him, at which time the several sales would be transferred to the new house." The foregoing facts of Kane's conspiracy with Raney to embezzle the Washington franchise are confirmed

by Kane's ultimate squealing on Raney's purpose as admitted by Raney and Miller, Kane's original purpose to finance, with Raney, the acquisition of the Washington franchise, Kane's claimed ouster of Raney for squealing on Raney's infidelity, Kane's concealment from plaintiff of his own involvement with Raney, and Kane's own purpose to obtain the Washington franchise for himself, as he later did after the ruination of plaintiff's business.

Kane, while manager and vice president of plaintiff, in early July, 1951 caused to be sold an airconditioning machine belonging to plaintiff and neither Kane nor anyone else paid over to plaintiff the proceeds of the sale at any time. Kane informed Churchill, the bookkeeper and cashier, sometime before leaving plaintiff's employ on July 27, 1951 and on or about July 15, that he had $50 in cash belonging to plaintiff which he would turn-in to the company upon receipt of a "salary" check he expected on July 20. He did not report what merchandise was represented by the $50. He never did turn-in the money to plaintiff. Yet it was the practice of all employees to turn-in and deliver to Churchill, the cashier, all funds of the company. He never informed Rickman of the receipt of that money. (Churchill deposition, pp. 8-12, 19-21; Churchill Ex. 2; Rickman deposition, pp. 7-8)

Kane had also drawn from the petty cash box of plaintiff in July, 1951 the sum of $34.50 without consideration. (Churchill deposition, pp. 27-29; Churchill Ex. 4)

It was the custom of plaintiff to maintain a complete record of each printed invoice with its printed numerical number thereon, and to account for each such invoice. Churchill made an investigation and found that there were ten missing and unaccounted for invoices from May 9 to June 25, 1951, despite the requirement that plaintiff required an invoice to be made out for each sale made. Kane was in charge during that period. (Churchill deposition, pp. 13-17, Churchill Ex. 1)

Mr. Kane made a sale of merchandise to a Dr. Rosenberg upon which he allowed a credit of $400 for two pieces of used merchandise. Investigation showed that such recorded two pieces of merchandise were non-existent, and of course plaintiff received nothing in return for the $400 credit. It was a false entry, by Kane. (Churchill deposition, pp. 17-19) Investigation showed that the two pieces of equipment had already been received by plaintiff from other customers and were in plaintiff's possession; but Dr. Rosenberg had been allowed in effect a twenty per cent discount. (Rickman deposition, pp. 9-13)

For the period from October 2, 1950 through July 20, 1951 plaintiff had advanced to Kane as a drawing account $4,775.00 against which he had earned commissions of only $3,474.20; hence his excess drawings from plaintiff had been $1,300.80 (Churchill deposition, pp. 25-26, Churchill Ex. 3). A more comprehensive analysis prepared by Mr. Rickman from the records of the company showed that he had overdrawn $1,831.37 after making adjustments in accordance with the policy of the company in similar instances. (Rickman deposition, pp. 33-38; Rickman Ex. 17A, B and C)

During Churchill's employment by plaintiff from June, 1951 through August, 1952 plaintiff was unsuccessful.

Churchill had requested Kane, upon plaintiff's instructions, to make a card file of his customers for plaintiff, but Kane declared he had never done that for any employer and did not intend to do it then. (Rickman deposition, p. 8)

For the nine months' period ended June 30, 1951 plaintiff had suffered a net loss of $5,674.34, and plaintiff's president, Benton, had by that time been required to advance a total of $19,910.31 to plaintiff over and above the $18,500 capital in cash with which plaintiff started business nine months before. That loss did not take into account the sums due from Raney and Kane covering their excess drawings, which plaintiff

was never to be able to recover. (Accountant Rickman deposition pp. 4-5; Churchill-Rickman Exs. 5, 6 and 9). The financial statements as of June 30, 1951 had been prepared in the usual course of business, and correctly reflect the business of plaintiff. (Rickman deposition, p. 6) Rickman was an accountant in the regular employ of plaintiff from July, 1951 through November, 1951, and served plaintiff as an independent accountant thereafter, and was familiar with the books of account. (Rickman deposition, pp. 3-4) At the time of his testimony he was assistant trust officer of the National Bank of Washington, and had had experience in public accounting for three other companies, and auditing of the records was a part of his normal accounting work covering a period of ten years. (Rickman deposition, pp. 2, 40)

For the one year period ended September 30, 1951 plaintiff had suffered a net loss of $11,021.04 and its officer, Benton, had by that time been required to advance a total of $26,700 to plaintiff, over and above the $18,500 cash capital with which it started business a year before. (Churchill deposition, pp. 31-35, 38-48; Churchill Exs. 7 and 8; Accountant Rickman deposition, pp. 1-6; Churchill-Rickman Exs. 10, 10A, 10B, 10C, prepared by Accountant Rickman)

Such financial statements reflect the business of plaintiff as of the respective dates thereof. (Rickman deposition, p. 6)

For the nine month period from October 1, 1951 to June 30, 1952 plaintiff suffered a net loss of $11,854.99, and its officer, Benton, had advanced a total of $32,169.95 remaining unpaid at June 30, 1952 over and above the $18,500 cash capital with which it started business (Rickman deposition, pp. 13-16; Rickman Exs. 11, 12, 13). For the whole year ended September 30, 1952, plaintiff suffered a loss of $14,588.51 (Rickman Ex. 14, p. 14), but the notes payable to Benton had been reduced to $14,932.09, due to reduced inventory. Such loss is in addition to the losses resulting from the excess drawings by Raney and Kane which plaintiff was never to recover.

In October, 1951 defendants submitted to plaintiff a written contract effective as of October 5, 1951, to be signed, a copy of which is annexed to the amended complaint. (Tr. 68-70, Ex. B amended complaint per court order of October 23, 1956, R. 37-49). It is a new agreement, and makes no mention of the existence of any previous or then existing definitive contract between the parties, thus showing that the only contractual arrangements between the parties were represented by the relation of manufacturer and exclusive distributor, and evidenced by plaintiff's two letters of October 6, 1950 and defendants' acceptance of October 12, 1950, supra. That was the only definitive contract between the parties known to plaintiff, or to bookkeeper- comptroller Brown. (Tr. 163-4)

As a direct result of plaintiff's inability to obtain competent management and salesmen, and its resultant small sales of products in late 1951 and 1952, defendant cancelled its contract with plaintiff April 25, 1952, and gave the franchise to District X-Ray Company owned by Dennis J. Kane, plaintiff's vice president who had succeeded Raney, and its former service manager Krame whom Kane had taken, and a certain doctor. (Tr. 72)

After Kane left plaintiff's employ in July, 1951, he had sought to obtain plaintiff's Washington franchise (Tr. 73). Mathis admitted that he might have sent Raney to Washington for the purpose of giving the franchise to Kane. (Tr. 74) Raney admitted that in 1952 he went to Washington for conference with Kane (his ex-confederate) in respect of Kane's company acquiring the Fischer franchise for the Washington area, and did confer with Kane and Kramer, investigated conditions and reported the facts to Mathis, and he knew that Kane had corresponded with Mathis in an effort to obtain the franchise. (Tr. 108-110)

Plaintiff's poor sales' record after losing Raney, and the infidelity of both Raney and Kane, and the encouragement of defendants, were the very direct cause of the ruination of plaintiff's business, and the

ultimate loss of the whole franchise, following the loss in April, 1951 of the Virginia franchise as a direct consequence of Raney's infidelity in representing false facts to Howard Lox about plaintiff's condition, in sabotaging plaintiff's contract to engage Lox, and in enabling Lox and Otteson to take plaintiff's Virginia franchise.

Having lost the entire Fischer franchise, and having suffered large losses from operations as a result thereof and as a result of the loss of Raney and Kane due to defendants' breach of contract and their tortious acts in aiding and abetting Kane and Raney, plaintiff was finally able to sell the business, but only to its former vice president Dennis J. Kane and its former service man, Kramer, after losing the whole Fischer franchise, for approximately $12,000 (which represented inventory cost). (Tr. 198)

The deposition of William Moguin was offered, and plaintiff offered to prove that by such deposition that Kane accomplished what he had set out to do, and that upon the day of acquiring the assets of plaintiff Dennis J. Kane (Plaintiff's vice president in succeeding Raney) declared that he had made a very profitable deal with plaintiff as to the terms thereof and that they would profit by the deal; but the court sustained an objection to such proof, in error. (Tr. 224-5; deposition of Moguin)

Brazenly, defendant Mathis under the guidance of his counsel, refused to produce any documents required by a subpoena duces tecum served upon him as a defendant, on the alleged invalid ground that witness fees had not been tendered him. And, revealing the highly improper conduct of the attorneys for defendants, defendants' counsel Mr. Burt, delcared to the court that he "THREW IT AWAY", in utter contempt of the process of the court. He could not produce it in court, and Mr. Ketchum, one of counsel for plaintiff, certified that he served the subpoena on Mr. Mathis, but that his copy was not available in court at the moment. (Tr. 233-236)

Accountant Rickman made an analysis of the total losses sustained by plaintiff commencing October 2, 1950 and through October 18, 1954, which showed a loss of $36,592.75, being a comparison of all items affecting profit or loss of the business. The analysis was made from the books of account kept in ordinary course of business, bank statements and cancelled checks, and business records, including invoices, receipts, bank checks, bank statements and the like. The only oral information used was in the description of the purpose for which a check was issued and Mr. Rickman had no reason to question the propriety of any expense item. (Rickman deposition, pp. 18-27)

The figure $36,592.75 represents the excess of expenses over the income of the business, which is the only way of determining the loss; and Mr. Rickman's conclusion is the result of an accurate reflection of what the records of the corporation show to the extent of his knowledge. Mr. Rickman knew of no items of income whatever that were not reflected in his analysis, nor did he know of any item of expense that would not be properly chargeable to the corporation. (Rickman deposition, pp. 27-8)

Mr. Rickman emphasized that the "business actually lost that amount of money, $36,000", it being the operating loss, and that is confirmed by the capital loss of $18,500 and unpaid advances to the corporation by the stockholders of $18,618.67 (Rickman deposition, p. 30). And Rickman had had the books of account of the corporation in his custody since the corporation discontinued business in September, 1952. (Rickman deposition, p. 31) The basis for Mr. Rickman's conclusion is shown by his Exhibits Nos. 16 and 16A. (Rickman deposition, p. 31)

Mr. Benton, plaintiff's president, and trustee in liquidation of plaintiff, identified Rickman Exhibit 16A as being a statement prepared from the records of plaintiff by Mr. Rickman, accountant; and testified that the figures therein contained are correct, and reflect all of the net results shown by the records of plaintiff. (Tr. 251)

The accuracy of the foregoing facts, and the sufficiency of the proof thereof in the record cannot be conscientiously challenged by defendants. If any such facts be challenged in defendants' reply brief, plaintiff will furnish a further appendix in printed form or typewritten form ten days before the argument containing the evidence relied upon.

SUMMARY OF ARGUMENT

1. Defendants breached their contract with plaintiff for (a) plaintiff's exclusive rights to sell its products in Washington, D. C., Virginia and Maryland, and (b) its commitment to extend to plaintiff "ALL POSSIBLE SUPPORT AND COOPERATION"; the consideration of which commitments was plaintiff's undertaking to distribute and sell defendants' products, and to service such products theretofore and thereafter sold in such territory, - by aiding and abetting Raney and Kane to appropriate to their own use plaintiff's franchise and to sabotage plaintiff's employees, which lead directly to the runination of plaintiff's business, to its damage in the sum of $36,592.

2. Defendants illegally interfered with, aided and abetted, and caused Raney to breach his contract with plaintiff, with the direct result that plaintiff lost its management and employees, and its business was destroyed, to its great loss and damage in the sum of $36,592.

3. Defendants trespassed upon plaintiff's free enjoyment of its contracts with defendants and with Raney, with the direct result that plaintiff lost its management, its employees, and its fischer Franchise, causing the runination of its business, to its great damage in the sum of $36,592.

4. The trial court committed gross error of law, without fact findings, in completely ignoring,

(a) the legal, contractual obligations of defendants and their actionable br ach thereof;

(b) the tortious nature of defendants' interference with plaintiff's rights under its contract with Raney; and

(c) the legal responsibility of defendants for their breach of contract, and for their tortious conduct. It held erroneously, that the action should have been brought alone against Raney and Kane, whereas the law is clear that defendants are liable for their breach of contract, and for their tortious conduct in conspiring with Raney, - plaintiff's fiduciary - and the resulting loss to plaintiff. (Tr. 258-261; Appendix 5-7)

CONTESTED ISSUES

1. Are defendants liable to plaintiff for their breach of contract to extend to plaintiff "ALL POSSIBLE SUPPORT AND COOPERATION" in its representation of defendants in the Washington area?

2. Are defendants liable to plaintiff for aiding and abetting Raney to breach his three-year contract with plaintiff, based on their deliberate interference with Raney's contract with plaintiff, with full knowledge of his fiduciary relation to plaintiff and plaintiff's reliance exclusively upon him, and defendants' conspiracy with Raney to enable Raney to embezzle plaintiff's franchise?

PROPOSITIONS OF LAW RELIED UPON, AND ARGUMENT

1. Breach of contract. For valuable considerations supplied by plaintiff, defendants committed themselves in October, 1950 to extend to plaintiff "ALL POSSIBLE SUPPORT AND COOPERATION" in the exercise of the exclusive franchise to sell defendants' products in Washington, Virginia and Maryland. Defendants breached that contract four months later, in January, 1951, and in March and April, 1951 by conniving, clandestinely, with plaintiff's vice president, Raney, to give the franchise to him and his confederates, and to take it away from plaintiff,

without any just cause. As a direct result of that breach of contract, and Raney's tortious conduct as a result thereof, plaintiff lost its franchise and its management, and its employees, and suffered the ruination of its business. Defendants' violated their express contractual undertaking, and every moral concept known to man. Defendants are accordingly liable to plaintiff for its damages.

2. Defendants are liable also to plaintiff for the consequences of their illegal and malicious interference with plaintiff's managerial contract with Raney.

Plaintiff was dependent exclusively upon Raney's compliance with his contract to serve plaintiff for three years, of which facts defendants had been informed, - otherwise plaintiff would have not entered the business. Defendants affirmatively aided and abetted Raney in his attempt to embezzle the franchise from plaintiff, with the direct result that plaintiff's business was ruined.

All parties who wrongfully induce a breach of contract are jointly and severally liable, and malice does not necessarily mean actual malice "but the intentional doing of a wrong act without legal or social justification." Intentional interference is sufficient. Hornstein vs. Podwitz, 254 N. Y. 443, 173 N. E. 674; Kervozky v. Lorber, 290 N. Y. 279, 49 N. E. 2d 146, 147. To recover against one tortiously inducing the breach of his contract, it is not necessary to show that the party breaching the contract is insolvent or could not otherwise respond to a judgment (as Raney is doubtlessly here unable to respond to a judgment); the liability is joint and several:

Simon v. Noma Electric Corp., 293 N. Y. 171, 56 N. E. 2d 537; Rosenberg v. [illegible]isberger et al., 200 Misc. 198, 108 N. Y. S. 2d 962; Louis C. Moser & Co., Inc. v. Kreger, 80 N. Y. S. 2d 199.

Plaintiff is not limited in the assertion of his rights as against the contract breaker, for all parties who induced the breach of contract are jointly and severally liable. Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674

It is Hornbook law that an aggrieved party is not compelled to sue all tort feasors. He may sue one or more or all of them at his discretion. Roberts Music Corp. v. Alamo Music, Inc., 119 F. Supp. 29 (South. Dist. NY.)

The Illinois authority is Hays v. Borders, 6 Ill. 46, 65 (1844), which said:

> "The tort feasor is responsible for all the consequences growing out of his wrongful act"; Hewitt v. The Ontario Copper Lighting Rod Co., 44 U.C.Q.B. 287, 290 (1879). "The measure of damages is not confined to the loss of the services of the servant enticed away. The jury are justified in giving ample compensation for all the damages resulting from the wrongful act."

Where the tort was intentional, as in this case, the tort feasor's liability "is extended to include all the damages towards which his tort was the contributing cause." (Columbia Law Review, Vol. XXX, Feb. 1930, No. 2, p. 236 The same article holds (p. 237):

> "Most courts have held that the plaintiff in an action for wrongfully inducing breach of a contract can recover punitive damages; often granting a larger sum for punitive damages than the total amount of compensatory damages recovered." (citing many cases)

It holds further that (p. 239):

> "The few cases which have considered the question have held that a person who has been wrongfully deprived of a contract is under no duty to the tort feasor to mitigate the damages." (citing many cases)

Yet, here, plaintiff sought in every way to mitigate its damages, by attempting to sell the business at the earliest possible opportunity, and meantime, to operate the business the best it could, with loss of competent management.

Defendants actively and affirmatively concealed from plaintiff the facts of Raney's wrong doing, and their own wrongdoing, by their clandestine correspondence with Raney; and thus committed a fraud on plaintiff. Sec. 155, Contracts, 17 Corpus Juris Sec., p. 508 states the rule:

> "The rule that nondisclose of facts does not constitute fraud does not apply where there is an active concealment of facts. This is a fraud."

3. Defendants are liable for their trespass on the case.

Plaintiff's third cause of action is in trespass on the case for defendants' wilful conspiracy with plaintiff's fiduciary, with knowledge of his illegal purposes and breach of his trust and contractual duties, to take away from plaintiff and to give to Raney plaintiff's property rights, an . for Raney to seduce plaintiff's employees to work for him in the operation of the franchise so to be embezzled from plaintiff, which was the proximate cause of the ruination of plaintiff's business to its damage in the sum of $36, 592.

Duane Jones Co. v. Burke, 121 N. Y. S. 2d 107 (1953) is a decision nearly in point. It held that employees of a company who started their own business by a new agency, and took plaintiff's customers and breached their fiduciary duties were liable to plaintiff for loss of profits, and recognized that a third person (such as defendants here) are liable if they participate in inducing the breach of contract, especially where animated by constructive malice.

Defendants are liable jointly and severally for losses resulting from their conspiracy to defraud plaintiff of its franchise and employees, involving breaches of fiduciary duties by plaintiff's officer and partner (Raney) and dealings with the fiduciary with knowledge of his wrongdoings: Corp. Juris Sec. Vol. 15, pp. 996, 1004; Jackson v. Smith, 254 U. S. 586, 65 L. Ed. 418; Irving Trust Co. v. Deutsch, 73 Fed. 2, 121.. cert. denied. 294 U. S. 709; Woodenware Co. v. United States,

186 U. S. 279, 46 L. Ed. 1164; Crites v. The Prudential Ins. Co., 322 U. S. 408, 64 S. Ct. 1075, 88 L. Ed. 1356; Russell v. Post, 138 U.S. 425, 34 L. Ed. 1009, holding that liability definitely attaches to one knowingly lending his aid in any way to the perpetuation of a fraud. Kernan v. Humble (La. 1899), 25 So. 431.

The leading case on breach of fiduciary duty is Meinhard v. Salmon, 249 N. Y. 458, 468, holding that "not honesty alone, but the punctilio of honor the most sensitive is then the standard of behavior" of fiduciaries. Id. Pratt vs. Shell Petroleum Corp., 100 Fed. 2d 883, 22 F. Sup. 304. And if two inferences may be drawn as to whether the conduct of the agent was to the damage of his principaltthe inference that it was will be made. Ashman vs. Miller, 101 Fed. 2d 85.

CONCLUSION

Here, the breach by defendants of their contract is clear. Their involvement with Raney is unconscionable. It violated every precept of business men. They connived with Raney to violate every precept of fiduciaries not to steal from their employees. The combined action of defendants and Raney was the direct cause of the ruination of plaintiff's business. The defendants' conduct was with clear knowledge of Raney's fiduciary position. Raney was the scoundrel. His acts, with the aid of defendants, ruined the business of plaintiff. Plaintiff suffered tremendous losses as a direct result of the combined acts of defendants and Raney. Defendants, with their knowledge, and their relation to plaintiff, were as guilty as Raney. Without defendants' wrongdoing, plaintiff would have retained the Fischer franchise, and Raney. Its damages should be recoverable from the joint-tortfeasor, the defendants, who also violated with impunity their contractual undertakings.

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APPELLANT'S APPENDIX

JUDGE IGOE CIVIL CALENDAR, 55C1112

BOOMHOWER, INC., a corporation
Plaintiff
vs.
H. G. FISCHER & CO., INC., an Illinois corporation, and
ALAN MATHIS, Franklin Park, Ill.
Defendants.

Basis of Action: Breach of Contract - $30,000 & costs

For Plaintiff: Appellant: Thaddeus G. Benton, 77 Park Ave., New York, N. Y.; W. M. Ketchum - Posner, Dunning & Marquard, Room 621, 175 W. Jackson Blvd. WA 2-3410. Additional Attorney: S. T. Sutton, 74 W. Washington St., 30 La Salle St. - RA 6-5793.

For Defendant: Russell B. Burt, Robert C. Pierce, 10 S. LaSalle Street (3) Suite 1200 - CE 6-7492 (Rose, Burt & Pierce)

7/26/55 Wm. K. Dep. received $15.00.

7/28/55 Treas. CD 25 disbursed $15.00.

4/3/57 CB Appeal received $5.00.

4/5/57 Treas. CD 281 disbursed $5.00.

7/26/55 Filed complaint and (2) copies (2) (JS-5), amount reported $15.00.

7/26/55 Issued summons and (2) copies with (2) copies of complt.

7/28/55 Filed security for costs.

8/23/55 Filed summons retd served (2) serv 13.00 d

8/25/55 Filed appearance of H. G. Fischer & Co and Allen W. Mathis and attorney.

8/25/55 Filed Answer of Defendants.

12/28/55 Cause set for Pre-Trial Conference on Mar 23, 1956 at

2:00 P. M. - Igoe, J. Mld Ntcs 12-30-55.

1/5/56 Filed Notice of taking depositions .

3/23/56 By agreement cause continued to April 6, 1956 at 2:00 P. M. for Pre-trial conf. Igoe J. Mailed notices 3/28/56.

4/6/56 Cause called for pre-trial conference. Deft's move orally to strike the complt. Said motion is argued and allowed, and the compit is hereby stricken. Pltf given 30 days herefrom to file amended complt and deft given 20 days thereafter to plead thereto - Igoe, J. (JS6) not mailed). Mld ntcs 4-11-56

5/7/56 Filed Amended Complaint (6)

5/25/56 Filed Motion to strike Plft's Amended Complaint. Brief in support of Defts Motion to strike.

6/5/56 Filed written interrogs to Allen W. Mathis (15)

6/12/56 Pltff's brief in opposition to motion to strike or dismiss the complaint.

6/14/56 Fld objections to plaintiff's interrogs. (3) Enter order.

7/17/56 Upon defendants' motion to strike the amended complaint, it appears plaintiff by a second amendment has attached documents and letters to support the allegations relied on, and as amended the complaint alleges a sufficient cause of action under Rule 12(b). Accordingly, defendants' motion to dismiss is denied. Defendants to answer within twenty (20) days. Cause set for trial on Oct. 15, 1956. -IGOE, J. Mld Ntcs. 7/19/56.

7/17/56 Fld. Plaintiffs reply to Defendants Objections (2)

7/27/56 Fld. Notice. (2)

7/27/56 Fld. Motion (1)

7/24/56 Order lv. S. T. Sutton to file his appearance as addlt. attorney for the pltff. -BARNES, J. Mld. Ntcs. 7/30/56.

7/27/56 Enter order motion to vacate order entered July 12th, 1956 and motion to set down for hearing Defendants' motion to strike Plaintiff's amended complaint and to hear objections to Plaintiff's interrogatories numbers 1 to 97, inclusive propounded to ALLEN W. MATHIS individually and as President of H. G. Fischer & Co., Inc., is entered and continued to Sept. 11, 1956 before Judge Igoe. -BARNES, J.

9/11/56 Motion to vacate order entd July 17, 1956, motion to set down for hrg defts' motion to strike pltf's amended complt and to hear objections to pltf's interrogs Nos. 1 to 97 incl. are contd to Oct. 5, 1956 at 2 P. M. - Igoe, J. Mld ntcs 9/12/56

10/5/56 by argmt cs contd to Oct. 19, 1956 at 2:00 P. M. for hearing on defts mot to vacate order of July 17, 1956 on defendants motion to strike amended complt and on objections to pltffs interrogatories. - Igoe J. Mailed notices 10/9/56

10/15/56 On plaintiffs motion cause reset for trial on Nov. 27, 1956. -Igoe, J. Mailed notices 10/15/56

10/19/56 Order hearing on motion to vacate order of July 17, 1956 on deft's motion to strike amended complt and on objections to pltf's interrogs contd to Oct. 23, 1956 at 10:00 A. M. -Igoe, J. Mailed notices 10/23/56

10/23/56 The order heretofore entered herein on July 17, 1956 is vacated and set aside. Pltffs amended complt is hereby stricken. Defts objcts to pltffs interrogs are argued and sustained and said said interrogatores are stricken. Pltffs gv 30 days herefrom to fl amended complt. Defts gv 20 days thereafter to ans or otherwise plead thereto. Cs reset for trial on Jan. 14, 1957, - Igoe, J. Mailed notices 10/29/56

1/3/57 Filed Amended Complaint and Exhibits (3, 9)

1/3/57 Plaintiff given until Jan. 4, 1957 to file amended complt. Defendants given twenty (20) days thereafter to ans or otherwise plead thereto. By agreement cause reset for trial on March 19, 1957. -IGOE, J. Mld. Ntcs. 1/4/57.

1/18/57 Filed Answer and exhibits (4)

3/4/57 Filed Supplemental Notice of the taking of depositions by plaintiff at Washington, D. C. 3-4-57 (1)

3/18/57 Fld deposition of Edwin P. Churchill

3/18/57 Fld deposition of William J. Moguin

3/18/57 Fld deposition of Lee H. Brown

3/18/57 Filed deposition of Wallace Rickman

3/19/57 Fld deposition of Walter W. Miller

3/15/57 Fld deposition of Interrogatories of Mr. Howard O. Lox

3/19/57 Filed Doctor's statement dated 3-18/57 re Mrs. Edwin Rainey

3/19/57 Filed appearance as atty. for defendant. Cause called for trial - opening statements heard and concluded. Evidence heard for plaintiff in part. Cause contd. to March 20, 1957.-IGOE, J. Mld. Ntcs. 3/25/57

3/21/57 Further evidence heard for plaintiff-Plaintiff rests. At the close of plaintiffs case, defendants move for a finding in their favor. Said motion is argued and allowed. Enter Finding in favor of the defendants and against Plaintiff herein, Igoe-J. (JS 6)

30/20/57 Further evidence heard for plaintiff, cause continued to March 21, 1957, Igoe-J.

3/26/57 Mld. Ntc. m/s

4/3/57 Filed Notice of Appeal of Plaintiff (1), Clerk's Fee $5.00 pd.

4/3/57 Mailed copy of notice of appeal to attys. for defendants-B

4/3/57 Filed subpoena duces tecum retd served

4/15/57 Filed Bond on appeal (1)B

4/17/57 Filed Appearance of defendants-appellees and attys. Rule 12(d)USCA, 7th Cir. (1) B

5/3/57 Clerk's File copy of transcript of proceedings had before the Honorable Michael L. Igoe, Judge on March 19, 20, and 21, 1957 filed by the official court reporter (262)

5/3/57 Filed plaintiff's Exhibits 27, 29, 30, 32, 33, 34, 35, 36, 38, 39, 40, 41. 42, 43, 44, 46, 48, 49, 50, 51, 53, 54 and 55.

5/13/57 Filed Notice and Motion for extension of time in which to file record (3)

5/13/57 On its own motion plaintiff given 30 days herefrom to file record on appeal - Igoe, J. Mailed Notice to Attys. 5-13-57

6/12/57 Filed Notice and Motion for extension of time in which to file record (3)

6/12/57 On its own motion, plaintiff given an additional thirty (30) days within which to file record on appeal -Igoe, J. Mailed notice to Attys. 6-12-57

7/10/57 Mailed Transcript of portion of record on appeal to U. S. C. A. 7th Circuit, Clerk's Fees $1.60 pd.

[Clerk's Certificate]

TRANSCRIPT OF PROCEEDINGS

1 IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

BOOMHOWER, INC., Plaintiff	)	
-vs-	)	No. 55-C-1112
H. G. FISCHER & CO., INC., and ALLEN W. MATHIS, Defendants.	)	COURT'S OPINION

EXCERPTS OF PROCEEDINGS

had in the above-entitled case taken before the Hon. MICHAEL L. IGOE, one of the Judges of said court, without a jury, in his court room in the United States Court House at Chicago, Illinois, on Thursday, March 21, 1957 at 10 o'clock a. m.

APPEARANCES:

MR. THADDEUS G. BENTON,
MR. W. M. KETCHUM, and
MR. S. T. SUTTON,
representing the plaintiff;

MR. RUSSELL B. BURT, and
MR. ROBERT G. PIERCE,
representing the defendants.

- - - - - - - - - - -

258 Court's Opinion

THE CLERK: 55 C 1112. Boomhower, Inc., vs. H. G. Fischer & Co., et al. Case on trial.

* * * * * * *

THE COURT: It would appear to me that this lawsuit has been brought against the wrong people. If any substantial portion of what has been said here concerning Mr. Raney or Mr. Cane or some of those other gentlemen down in Washington is true, it would appear as if the right of action of Boomhower ought to be against them and not against the local defendant. They have here a complaint. They say it is the fourth amended complaint. I thought there were only three, but you say there are four?

MR. PIERCE: There may be three, Your Honor.

THE COURT: In which, first of all, they set up "that there is a contractural situation existing between Boomhower, Inc., and H. G. Fischer & Co., Inc., also against Mr. Mathis, concerning the operation of Boomhower, Inc., down in Washington."

Now, just what they base that on is hard for me to understand.

There is a letter here which indicates the employment by Boomhower of Raney. There isn't any evidence that the defendants
259 here were parties to that contract, and I don't see how under the terms of that contract there can be any binding obligation upon these defendants.

As the testimony came in here it would appear that there was a company operating down in Washington, of course, composed of the individuals, and there came a time when there was dissatisfaction. There came a time when there was a severance of the relations which theretofore had existed.

There came a time when one of the employees who severed his connection, or one of the officers severed his connection from the plaintiff, desired to secure the franchise that the plaintiff then enjoyed concerning the sale of certain medical equipment in certain territories, and he applied to the defendant for the franchise. Correspondence thereafter was had. Nothing further was done about it.

The franchise was not given to him. The franchise was not taken from Boomhower, Inc.

The person who severed his connection with Boomhower wound up in the employ of Fischer & Co., one of the defendants here in Chicago.

260 Well, that is not a crime, and that is not a violation of any contract. And for the life of me, I can't see any contractural relationship which existed between Fischer & Co., and Mr. Mathis of Franklin Park in this State, and Boomhower, Inc., down in Washington.

It is true that had this contract with Raney. That is not binding upon Fischer & Co., and it is not binding upon Mr. Mathis, and I don't know of any reason in the world why Mr. Mathis could not receive, and should not receive applications from employees of different companies relative to franchises which were then in existence, or which might thereafter be issued.

There is no evidence here of any contractural obligation on the part of these defendants to Boomhower, Inc., and, therefore, there can't be any recovery upon the first count in this indictment.

Insofar as the second count is concerned relative to something that was done maliciously and illegally, there isn't any evidence to support that count.

The third count, counsel for the plaintiff has stated it is a catch-

261 all of the first two.

Your motion for a finding for the defendants will be allowed.

MR. PIERCE: Thank you, your Honor.

* * * * *

[Reporter's Certificate]

PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of March, being the 4th day thereof, in the Year of Our Lord One Thousand Nine Hundred Fifty-Seven and of the Independence of the United States of America, the 181st Year.

Present:

Honorable JOHN P. BARNES, Chief District Judge
Honorable WILLIAM H. HOLLY, District Judge
Honorable PHILIP L. SULLIVAN, District Judge
Honorable MICHAEL L. IGOE, District Judge
Honorable WILLIAM J. CAMPBELL, District Judge
Honorable WALTER J. LA BUY, District Judge
Honorable J. SAM PERRY, District Judge
Honorable WIN G. KNOCH, District Judge
Honorable JULIUS J. HOFFMAN, District Judge

Roy H. Johnson, Clerk
William W. Kipp, Sr., Marshal

Thursday, March 21, 1957
Court met pursuant to adjournment
Present: Honorable Michael L. Igoe, Trial Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BOOMHOWER, INC., a corporation, Plaintiff	)	
vs.	)	Civil Action No. 55C1112
H. G. FISCHER & CO., INC., an Illinois corporation, and ALAN MATHIS, Franklin Park, Illinois, Defendants	)	

COMPLAINT

Plaintiff, complaining of defendants, alleges:

1. Plaintiff is a corporation organized and existing under the laws of Delaware, and was engaged at all times hereinafter mentioned in business principally in the District of Columbia, until on or about September 2, 1952 when it ceased its business activities.

2. Defendant H. G. Fischer & Co., Inc. is an Illinois corporation, with principal place of business at Franklin Park, Illinois. Defendant Alan Mathis is a citizen of the State of Illinois, with office at the H. G. Fischer & Co., Inc. at Franklin Park, Illinois.

3. The amount in controversy is in excess of $3,000 exclusive of interest and costs.

4. Plaintiff was organized in September, 1950 for the purpose of acquiring, and acquired in 1950 the business and franchises of D. W. Boomhower in Washington, D. C., consisting of the wholesale and retail medical equipment business. The principal franchise for the sale of medical equipment thus acquired, and upon which the success of plaintiff's business depended, consisted of the franchise to sell exclusively the products manufactured by defendants (being x-ray machines and accessories and diathermy machines and accessories) in the District of Columbia and other nearby states including Virginia; the franchise having been acquired with the full knowledge, approval and consent of defendants and upon condition that one Ed Raney would manage the business for a period of three years, as known to defendants.

5. Defendants in March, 1951 or thereabouts, and thereafter, wrongfully and wilfully conspired and confederated with plaintiff's two successive and trusted managers and vice presidents, upon whose continued and faithful services plaintiff was wholly and exclusively dependent, pursuant to contracts between them and plaintiff, for the successful conduct of its business, in violation of defendants' contract with and fiduciary duty to plaintiff covering the agency of plaintiff for defendants, and in tortious interference with and trespass upon the fiduciary and contractual obligations of the said vice presidents to plaintiff and the right thereto which plaintiff expected to enjoy, of which fiduciary and contractual obligations defendants had notice, and in fraud of plaintiff's rights, to breach their contracts with and their fiduciary obligations to plaintiff, and to accept and take for themselves the said franchise and to terminate and breach their employment contracts with plaintiff.

6. As a result of the said conspiracy and of the wrongful acts of defendants aforesaid, and the said vice presidents committed following the acts of defendants, plaintiff lost its said franchise and its said managers who breached their employment contracts with and fiduciary duties to plaintiff, and the first of whom accepted employment offered him by defendants; and plaintiff's business was ruined, to plaintiff's great loss and damage in the sum of $30,000.

7. Plaintiff did not learn of the part defendants played in the aforesaid conspiracy until in or about the month of May, 1954; and such information had at all times prior thereto been concealed from plaintiff.

WHEREFORE, plaintiff demands judgment of defendant in the sum of $30,000, together with interest thereon and the costs of this action.

/s/ Thaddeus G. Benton
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Wabash 2-3410
Chicago, Illinois

This being the day to which this cause was continued for further trial again come the parties by their counsel and the trial proceeds, at the close of plaintiff's case the defendants by their counsel enter their motion for a finding in their favor and the Court having heard arguments of counsel on said motion and being fully advised it is

ORDERED that defendants' motion for a finding in their favor be and the same hereby is allowed and finding in favor of the defendants and against the plaintiff entered and it is

ORDERED AND ADJUDGED that the plaintiff take nothing by this cause of action and that the defendants go hence without day and do have and recover of and from the plaintiff its costs and charges in this behalf expended

---

[Filed April 3, 1957]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT Boomhower, Inc., plaintiff in the above entitled action, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 21, 1957 pursuant to the oral decision announced by the court on March 21, 1957, and from any and all action taken by the court in pursuance of such oral decision of March 21, 1957.

March 29, 1957.

/s/ Thaddeus G. Benton
77 Park Avenue, New York, N. Y.

/s/ S. T. Sutton
30 North La Salle St.,
Chicago, Illinois.

/s/ W. M. Ketchum
Suite 621, 175 West Jackson Blvd.,
Chicago, Illinois.

TO: THE CLERK,
DISTRICT COURT OF THE U. S.
NORTHERN DISTRICT OF ILLINOIS,
CHICAGO, ILLINOIS

ATTORNEYS FOR PLAINTIFF

[Certificate of Service]

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RECORD

Comes now BOOMHOWER, Inc., a corporation, petitioner herein, by S. T. SUTTON and W. M. KETCHUM, its attorneys, and represents unto this Honorable Court that because of the fact that its said attorneys have been so continuously engaged in trials in the Circuit and Superior Courts of Cook County since the filing of notice of appeal herein, that the said attorneys have not been able to devote the necessary time to the preparation of the record in the within case for appeal; that the time for the presentation of the record in this matter to the United States Court

of Appeals for the Seventh Circuit expires today.

WHEREFORE, your petitioner respectfully prays this Honorable Court that it enter its order granting an extension of thirty (30) days in which to file the said record on appeal herein in the United States Court of Appeals for the Seventh Circuit.

/s/ S. T. Sutton
Attorneys for Petitioner

[Verification of S. T. Sutton]

NOTICE

To: Russell B. Burt, Esquire
10 So. LaSalle Street,
Chicago, Illinois
Attorney for Defendants

PLEASE TAKE NOTICE that on Monday, May 13, 1957, at the opening of Court or as soon thereafter as counsel may be heard, we shall appear before the Honorable Michael L. Igoe in the room, usually occupied by him as a court room, and then and there present Motion for Extension of Time in which to file the Record in the within cause in the United States Court of Appeals for the Seventh Circuit.

At which time and place you may appear if you see fit.

/s/ S. T. Sutton
S. T. Sutton and W. M. Ketchum
30 N. LaSalle St. An 3-6284
Attorneys for Plaintiff

Received a copy of the foregoing Notice
together with Motion therein referred to,
this 10th day of May, 1957

/s/ Russell B. Burt
Attorney for Defendant

On motion of plaintiff by its counsel it is

ORDERED that the plaintiff be and hereby is granted 30 days herefrom within which to file record on appeal.

NOTICE

To: Russell B. Burt, Esq.,
10 South LaSalle St.,
Chicago, Illinois.
Attorney for Defendants.

PLEASE TAKE NOTICE that on Wednesday, June 12, 1957, at the opening of Court or as soon thereafter as counsel may be heard, we shall appear before the Honorable Michael L. Igoe in the room usually occupied by him as a court room, and then and there present a Motion for Extension of Time in which to file the Record in the within cause in the United States Court of Appeals for the Seventh Circuit.

At which time and place you may appear if you see fit.

/s/ S. T. Sutton
S. T. Sutton and W. M. Ketchum
30 N. LaSalle St. AN 3-6284
Attorneys for Plaintiff

Received a copy of the foregoing Notice
together with Motion therein referred to,
this 11th day of June, 1957

/s/ Russell Burt

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RECORD

Comes now BOOMHOWER, Inc., a corporation, petitioner herein, by S. T. Sutton and W. M. Ketchum, its attorneys, and represents unto this Honorable Court that because of the fact counsel associated together in this case are located in different cities, i.e. Mr. Thaddeous Benton, of counsel is located in New York City, while Mr. Sutton and Mr. Ketchum

are located in Chicago, and that more than the usual time is consumed in the preparation of the record and briefs because of the necessity of having all documents and papers examined in both cities, since all associated counsel must needs be of one mind in the matter of the contents of the appeal.

That time for the presentation of the record in this matter to the United States Court of Appeals for the seventh Circuit expires, today, June 12th, 1957.

WHEREFORE, your petitioner respectfully prays this Honorable Court that it enter its order granting an extension of thirty (30) days in which to file the said record on appeal herein in the United States Court of Appeals for the Seventh Circuit.

/s/ S. T. Sutton
Attorneys for Petitioner.

[Verification of S. T. Sutton]

On motion of plaintiff by its counsel it is

ORDERED that plaintiff be and hereby is granted an additional thirty (30) days within which to file record on appeal.

[Filed May 3, 1957] Plaintiff's Exhibit No. 27

D. W. BOOMHOWER CO.
Factory Distributor
X-Ray and Physical Therapy Equipment
1766 Columbia Road, N. W., Washington, 9, D. C.

Oct. 6, 1950.

H. G. Fischer & Co.,
9451 W. Belmont,
Franklin Park, Ill. Att'n. Mr. A. W. Mathis.

Dear Mr. Mathis:

I am happy to inform you that as of October 2nd, 1950 the D. W. Boomhower Co. has incorporated under the new name BOOMHOWER, INC.,

a Delaware corporation licensed to do business in the District of Columbia.

With the exception of cash on hand and accounts receivable the Corporation has acquired all the assets of the old individual ownership including good-will, etc.

Officers and stock-holders of the new corporation are T. G. Benton, Pres.; D. W. Boomhower, Vice-Pres.; Ed. M. Raney, Vice Pres.; F. Benton, Secretary-Treasurer.

Ed. Raney will remain in full charge and there will be no material change in operational details from the past excepting - we hope - expansion of our sales volume and efforts.

Mr. T. G. Benton, a well known Washington man, with many friends here, and good banking connections, and a business man of much experience, will serve as President, and we will have his full support in all respects. He is a lawyer by early training, having served under Harlan Stone, our late Chief Justice of the Supreme Court as one of his young special assistants to the Attorney General; and during the late war served as General Counsel to the Petroleum Industry. He is highly recommended to me by the American Security & Trust Co. (Col. Bill Schooley) and the Riggs National Bank (Burnside-Vice Pres.) I am very happy to bring him into our industry and know we will all enjoy working with him.

Purely for the record, will you write the Corporation assuring us of the continuation of our Sales Franchise with you and your continued support and cooperation.

Sincerely,

Boomhower, Inc.

/s/ Don Boomhower, Vice. Pres.

BALANCE SHEET

BOOMHOWER, INC.
1766 Columbia Road, NW
Washington 6, D. C.

(Opening - October 3, 1950)

Assets		Liabilities		
Cash	$ 4,517.26	Miscellaneous Organization Expense-Approximate		$ 500.00
Inventory, Stock in Trade*	16,133.58	Capital Stock (Paid in in Cash)		
Furniture and Fixtures*	2,181.59	Preferred	$ 7,500.00	
Tools, as valued	113.70	Common	11,000.00	
Prepaid expense-Rent-October	225.00	Total		18,500.00
Prepaid-expense-Insurance	150.00	Surplus		4,441.25
Prepaid expense-Personal Property Tax	120.12			
TOTAL	$23,441.25	TOTAL		$23,441.25

*Depreciated cost to predecessor owner of business

SIGNED: D.W. Boomhower Vice Pres.
Ed. M. Raney Vice Pres.
Leo H. Brown Bookkeeper.

Plaintiff's Exhibit No. 28

October 12, 1950

Boomhower, Inc.
1766 Columbia Road, NW
Washington 9, D. C.

Attn.: Mr. Don Boomhower,
Vice President

Gentlemen:

We are interested to have your two letters of October 6th informing us of your new corporation. We would like to extend to Boomhower,

Inc. our congratulations and best wishes for success.

We certainly expect to extend to Boomhower, Inc. all possible support and co-operation and extend to them the same discounts and terms that we have extended to D. W. Boomhower Co.

Cordially yours,
H. G. FISCHER & CO.

AWMathis:c

President

[Filed May 3, 1957]

Plaintiff's Exhibit No. 29

Mr. A. W. Mathis,
H. G. Fischer & Co.,
9451 W. Belmont,
Franklin Park, Ill.

Dear Mr. Mathis:

In my letter advising you of our incorporation, I forgot to ask that in your reply you assure us of the same dealer and cash discounts on all invoices as under the old individual ownership. Also that all future advertising sent out by the factory for our territory be under the name BOOMHOWER, INC.

Would it be possible for us to have a "cut" for advertising about 2 x 2 in size on the model #300 short wave?

I would like to give you a little bit more background on my new associate Mr. T. G. Benton. I remember that in the past it has been necessary for you to contact lawyers having influence and special associations in the Federal Government. I am anxious for you to meet Benton as I believe he can save you much time and get what you want when this is necessary. He served as an assistant Attorney General under Chief Justice of the Supreme Court Harlan Stone and as General Counsel of the Petroleum Industry and certainly knows his way around in legal and government circles in Washington and New York. He also maintains New York offices at 535 Fifth Ave., New York City. So the next time you

need someone with these connections I would suggest you talk with him. He is someone I believe you will enjoy knowing.

We just finished a good Medical Meeting at the Statler Hotel and I am just tired enough that I am going to take a week or ten days off for some real deep-sea fishing. Sure wish you could come along.

Sincerely,

/s/ Don Boomhower

[Filed May 3, 1957]

Plaintiff's Exhibit No. 30

2651 16th St. N. W.
Apartment 508
Washington 9, D. C.

Mr. Allan Mathis
H. G. Fischer Company
9451 West Belmont Avenue
Franklin Park, Illinois.

Dear Allan:

First, I am going to ask you to consider this letter and its contents completely confidential!

When I was in Chicago in January I intimated that the situation here might not be entirely satisfactory and at that time asked you about the possibility of taking over Fischer exclusively in this area.

It begins to appear that that time is close as Mr. Benton has utterly no conception of the surgical trade and has created a lot of dissention among the salesmen in trying to operate this business as a mercantile or automobile business. Both of the new boys in Virginia who started out to do a swell job have had enough. Unfortunately, one of my best men here is becoming filled up and wants no further part of him.

I can foresee in the near future a complete disintegration of a dandy sales organization which the record shows is capable and loyal and I hate to see it happen.

Frankly, a large proportion of our business is Fischer X-ray and if I had no other lines to worry with I think I can take a key man or two and double the Fischer business in this area. Baltimore has always been a sore spot and if we had the time to care for it ourselves we can get the business to which we are entitled both there and on the Eastern shore. But being tied down here every minute I cannot devote the time personally I would like to.

When I receive Mrs. Miller's letter about Arizona and New Mexico - my old loves - I was interested but thought of the two years hard work here and the splendid contacts among the Doctors which have been created so I cannot intelligently see tossing it overboard and having to do it again elsewhere.

Fortunately, I have capital available to handle the deal here on a dealer basis and can carry on in exactly the same manner as we have in the past.

Knowing you as I do, Allan, and your sense of loyalty I will ask a straight question. Will you let me have this territory exclusively on my own and take it away from this arrangement as of the present? Please advise me at my home address above.

Sincerely yours,

/s/ Ed. Raney

Plaintiff's Exhibit No. 31

AIR MAIL

March 27, 1951

Mr. Ed. M. Raney
2651 - 16th Street, N. W.
Washington, D. C.
Apartment 508

Dear Raney:

If, as you state in your recent letter, it appears that Boomhower, Inc. as it is presently set up bids fair to disintegrate as a proper sales force for our line and you feel that you can take over our line advantageously

yourself, we, of course, are agreeable to turning our representation over to you.

Your connection with us could be either that of operating on a commission basis at our maximum rates of commission or on a dealer basis, whichever you prefer.

We would make some slight adjustment or rearrangement of the territory which is now exclusively assigned to Boomhower, Inc. For one thing, we would make the State of Delaware open territory so that you, our Philadelphia representatives or for that matter any others of our Fischer representatives that may care to do so might operate therein. We would also make a change in the Virginia territory along a line that we feel indicated and advisable.

The territory we would offer you, therefore, would be as follows:

The entire State of Maryland

Washington, D. C.

The following counties in West Virginia (These are the West Virginia counties you presently have)

Berkeley	Grant
Jefferson	Pendleton
Morgan	Taylor
Hampshire	Randolph
Monongalia	Preston
Hardy	Tucker
Mineral	Barbour

The following counties in Virginia:

Clarke	King George	Rappanannock
Culpeper	Loudoun	Rockingham
Fairfax	Madison	Shenandoah
Fauquier	Orange	Spotsylvania
Frederick	Page	Stafford
Greene	Prince William	Warren

You will note that the above outline of Virginia counties offered you differs from your present assigned Virginia territory.

We would give you protection for three weeks from the date of our actually withdrawing certain Virginia counties from you and declaring the State of Delaware open in which to close any reasonable number of bona fide prospects you may have in such territory, you, of course, to

list such prospects with us specifically for the purpose of protection. Our offering the above outlined territory to you and offering you our line, also your retention of the territory, would be predicated upon your handling no items that would be competitive to ours and getting what we would consider a satisfactory and representative volume of business from the territory.

We will be ready to proceed along the lines under discussion when we have heard further from you.

Cordially yours,
H. G. FISCHER & CO.

AWMathis:c

President

[Filed May 3, 1957]

Plaintiff's Exhibit No. 32

March 31st, 1951
2651 16th Street, N. W.
Washington, D. C.
Apt. #508

Mr. Allan Mathis
H. G. Fischer & Co.
9451 West Belmont Ave.
Franklin Park, Ill.

Dear Allan:

Thanks for your prompt reply to my letter as I am ready to move. I only wish that you could spend a day or two with me so I could present in detail the situation as you would better understand the reasons.

There are three things in my mind at the moment before making it official:

1. I wish to retain Southern Virginia as I can keep the Roanoke man - who has demonstrated his ability - providing I am personally in control of distribution. The same applies with Mr. Holah in the Richmond area although I think I can better that situation.

2. How much time will you require to notify Boomhower, Inc. - which is only fair - of the cancellation of their franchise? I certainly do not wish it to be said at any time that there was any "scullduggery" in the transaction.

3. Please make a reasonable commitment of what you consider "a satisfactory and reasonable volume of business from the territory" in order that I may have a definite objective in mind.

4. Can you make any reasonable assurance to obtain film and chemicals in a reasonable amount to tide me over until the immediate emergency of this type of supply is relieved?

I have already arranged for other accessories such as tanks, cassettes, screens, dark room supplies, etc., but with an investment of this kind I would like to see the ground-work reasonably secure.

If it is possible I would relish a day or two with you if you can make it.

Sincerely yours,

/s/ Ed. Raney

[Filed May 3, 1957]

Plaintiff's Exhibit No. 33

April 5th, 1951
2651 16th St., N. W.
Apt. 508
Washington, D. C.

Mr. Allan Mathis
H. G. Fischer Company
9451 West Belmont Avenue
Franklin Park, Illinois

Dear Allan:

This affair has become an open brawl! If you have not yet received you will receive a letter from Benton stating his side of things - I presume. Mainly you will find it extolling the virtues of the "star salesman" which "we" have developed", etc., etc.

The party in question is one Dennis Kane whom you met once, I believe. He worked for Liebel about a year, then Dick Buck about the same time. From there he came to Don for several months; then left and went to Kloman for some four months and when Benton took this over he came back last October.

Don is suing him for some $350.00 on phony deals and several other parties on town have judgments against him. He has played it up to Benton that he is undoubtedly the smartest X-Ray man in existence. The facts are that he has made but three independent Fischer deals since he has been here. All others were developed from lead cards sent in by you and on the majority of them he has had to have help.

Ordinarily, Allan, I would not stoop to levelling on a man but in this case he and Benton feel that they can put one over on Pappy but he has lived too long for that.

Knowing you to be an honorable man, Allan, I am going to ask you to respect ALL of our correspondence as confidential and not open to the scrutiny of others. If Benton requests copies please consider the confidential nature of my letters - at least - and refuse him.

Holah was in today and will carry on but NOT with the Kane-Benton combination.

My reason for all of the foregoing is that I worked under a written agreement with Benton on a profit sharing arrangement and I do not propose to let him in his sly legal way try to chisel me out of my just earnings on a technicality.

Sincerely yours

/s/ Ed. Raney

[Filed May 3, 1957] Plaintiff's Exhibit No. 34

April 9, 1951

Air Mail

Mr. Ed M. Raney
2651 - 16th Street, NW
Apartment 508
Washington, D. C.

Dear Raney:

The territory outlined in our letter of March 27th is all that we would be able to assign you exclusively were you to take over our line in accordance with the correspondence between us. We feel that much of Virginia is too inaccessible to Washington, D.C. to have it logically be a part of the Washington, D.C. territory and for that reason we could only offer you those counties in Virginia that were set forth in our letter of March 27th.

In answer to your question No. 2, we would feel that about one month's notice to Boomhower, Inc. would be required.

What we would consider a reasonably satisfactory volume of business from the territory outlined in our letter of March 27th would be around $40,000 a year.

The film business, as you know, is a particularly vicious one right now. We can supply you with all the chemicals you require unless, of course, an allotment is made on those later on by our suppliers. We cannot secure DuPont Films but we can secure Eastman, Ansco and Buck and would be glad to accept orders from you for films and chemicals on the basis outlined in the enclosed letter. Just what quantities we could supply to you, however, we could not guarantee insofar as films are concerned. We could only take your orders on the basis outlined in the attached and do the best we could on them.

Cordially yours,

H. G. FISCHER & CO.

AWMathis:c
enc.

President

[Filed June 28, 1956]

Plaintiff's Exhibit No. 48

April 1st, 1951
2651 16th Street, N. W.
Apt. #508
Washington, D. C.

D. W. Boomhower
416 South Drive
Cherokee Park
Sarasota, Florida

Dear Don:

Even though this is April Fool day this is not an April Fool.

I want $5000.00'

The enclosed letter will explain why.

The situation here has reached that point as the Attorney has declared himself another dividend as of March 31st. He is bleeding this blind and I am of the opinion that all of this purported wealth is a swell check kiting idea as every time anything comes up he writes another check for himself in New York on the company account. The latest is a television to go into the television business.

Pappy always told me to have a damn good hold with one hand before letting go with the other so I have laid my ground work as you can see from Allan's letter.

I want to be in a position to work on a dealer basis and it takes capital which I do not have. I can get some of it from other sources but-as usual-they want 50% of the profits. Money is not worth that. In other words I am not going to carry along a lot of dead horses just to get started.

I propose to incorporate under the name of Raney-Fischer Corporation. All I can offer you as security is an assignment of inventory and fifty-five years of honesty. I am willing to issue a reasonable amount of stock for profit participation on a basis of ten percent return but with the privilege of retiring that stock by repurchase if it seems expedient.

Maybe you are all tied up for available funds or perhaps you are not interested. In either case say so without equivocation as I will understand it perfectly. This is purely a business transaction.

I can take Holah, Cissel and Kane along if I wish as well as the new man in Roanoke and Richmond. I have written Allan to change that limitation as he outlines.

Please drop me a line promptly as I am going ahead and do not want to make a mistake by going to the wrong people.

Sincerely,

/s/ Ed.

No. 935

In the

United States Court of Appeals

For the Seventh Circuit

No. 12087

BOOMHOWER, INC.,

Plaintiff-appellant,

vs.

H. G. FISCHER & CO., INC.

and

ALAN MATHIS,

Defendants-Appellees.

BRIEF AND APPENDIX FOR DEFENDANTS APPELLEES H. G. FISCHER & CO., INC. AND ALAN MATHIS.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12087

BOOMHOWER, INC., Plaintiff-Appellant, vs. H. G. FISCHER & CO., INC. and ALAN MATHIS, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Michael L. Igoe, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANTS.

STATEMENT OF FACTS.

The argumentative character of Plaintiff's Statement of Facts precludes us from accepting it as a fair and satisfactory outline of the factual situation presented to the trial court; and for the same reason we deem Plaintiff's Statement of Facts unsuitable for use as an Appendix, as Plaintiff has proposed, even if such substitution were permissible under the rules.

Plaintiff, a dealer in medical equipment, brought suit against defendant H. G. Fischer & Co., Inc., manufacturer and supplier of such equipment, and its President, Allan Mathis, for damages claimed by Plaintiff to have resulted

from alleged breaches of a supplier-dealer arrangement between the Plaintiff and corporate defendant. The cause was heard by the trial court without a jury and, at the conclusion of Plaintiff's evidence, an appropriate motion being made, the Court entered a finding for the defendants.

Under date of October 6, 1950, Plaintiff, Boomhower, Inc., Washington, D. C., addressed a letter to H. G. Fischer & Co., Inc., Franklin Park, Illinois, directed to the attention of Mr. A. W. Mathis, in which it was stated that as of October 2, 1950, D. W. Boomhower & Co. had incorporated under the name of Boomhower, Inc., and that, with the exception of cash on hand and accounts receivable, the new corporation had acquired all the assets of the old individual ownership. It was further stated that the officers and stockholders of the new corporation were: T. G. Benton, President; D. W. Boomhower, Vice President; Ed M. Raney, Vice President; and F. Benton, Secretary-Treasurer.

The letter further asserted that there would be no material change in operational details, and H. G. Fischer & Co. Inc. was requested to write the corporation, assuring it of the continuation of "our sales franchise with you and your continued support and cooperation." The letter was signed on behalf of Boomhower, Inc. by its Vice President, Don Boomhower, former proprietor of the business transferred to the new corporation (Pltf's App. 14, 15).

The above letter was supplemented by a second letter (apparently undated) written by Don Boomhower to Mr. A. W. Mathis, H. G. Fischer & Co., Inc., in which Boomhower requested an assurance that the same dealer and cash discounts on all invoices would be allowed as under the old individual ownership, and also that future ad-

vertising sent out by the factory for "our territory," be under the name of Boomhower, Inc. (Pltf's App. 17, 18).

Defendant H. G. Fischer & Co. Inc., on October 12, 1950, acknowledged receipt of the two foregoing letters, offered its best wishes for the success of the corporation, and assured the corporation of the same discounts and terms that had been extended to D. W. Boomhower Co., as well as all possible support and cooperation (Pltf's Brief, 4).

At the time of the transfer of the D. W. Boomhower business to Boomhower, Inc., defendant H. G. Fischer & Co. Inc., had "a regular sales contract" with D. W. Boomhower for the distribution of H. G. Fischer & Co. Inc.'s equipment in the Washington territory, which included certain counties in Virginia and Maryland contiguous to Washington.

The defendants were first informed of the transfer of the former Boomhower & Co. proprietorship business to the plaintiff corporation by the letters above mentioned. Allan W. Mathis, President of H. G. Fisher & Co. Inc., assumed that the existing or old contract with Boomhower & Co. was taken over by Boomhower, Inc. by virtue of the letters exchanged, and did not ask Boomhower, Inc. to sign a contract until all contracts with dealers were changed in October, 1951. (Deft's. App. 2).

Some time after the transfer of the business of Boomhower & Co. to plaintiff corporation, Ed Raney, who had been employed by the former proprietorship business and who had accepted a position with the plaintiff corporation and had become a Vice President, addressed a letter to defendant Allan Mathis, President of H. G.

Fischer & Co., Inc., in which the writer informed defendant Mathis that Mr. Benton appeared to have no conception of the surgical trade and had created a lot of dissension among the salesmen; that two of the salesmen who had started out well had had enough, and a third salesman was dissatisfied. Raney further stated that he could foresee in the near future a complete disintegration of the sales organization, and the letter concluded by an inquiry as to whether Raney might hope to acquire the territory. (Pltf's Exh. 30).

Defendant H. G. Fischer & Co. Inc., by defendant Mathis, its President, responded to the above letter under date of March 27, 1951. This reply began as follows:

> "If as you state in your recent letter, it appears that Boomhower, Inc. as it is presently set up bids fair to disintegrate as to a proper sales force for our line and you feel that you can take over the line advantageously yourself, we, of course, are agreeable to turning over our representation to you." (Pltf's Exh. 31).

Subsequently, another letter dated April 5, 1951, was written by Ed Raney to defendant Mathis, in which Raney described the dissension in the Washington dealership as an "open brawl" and set forth his version of the dispute and the situation which had developed (Pltf's. Exh. 33).

On April 9, 1951, H. G. Fischer & Co. Inc. replied to the foregoing letter, indicating that it would consider Raney for a certain territory including Washington, D. C., after giving Boomhower, Inc. required notice. (Pltf's Exh. 34).

Defendant Mathis examined by Plaintiff's attorney, testified that the consideration given Raney with respect to the Washington territory was subject to various "ifs",

the "ifs" being: "if Boomhower, Inc. went to pots. If you lost all your sales force, and those things that he had mentioned," and further, "if your business dropped off to the point where we could no longer do justice to the company by continuing to do business with you, why, then I would have done it. I have got duties to the company." (Defts.' App. 3).

Defendant Mathis further testified that there were a lot of "ifs" which never materialized and that Raney never had a franchise from defendant H. G. Fischer & Co. Inc. in that territory. Plaintiff's contract of October 19, 1951, was cancelled April 25, 1952, and the Washington area franchise was given to the District X-Ray Company (Defts' App. 5).

Defendant Mathis testified that the District X-Ray Company was headed by Dennis Kane and a man named Kramer, who, according to his understanding, had left Boomhower, Inc. and organized the District X-Ray Company, and had been selling North American and Phillips X-ray equipment for a year or more. In all events, they were already set up in business and had a line of X-ray equipment, and that Kane had not, while employed by Boomhower, Inc., tried to obtain the Fischer & Co. franchise in the Washington area. (Defts' App. 6). Defendant Mathis further understood that District X-Ray Company had purchased the assets of Boomhower, Inc. (Defts' App. 6).

Ed Raney, plaintiff's former employee and Vice President, called as a witness by plaintiff, identified an instrument as a letter of application for his employment by plaintiff corporation written and submitted to him by Mr. Benton (Dfts.' App. 7).

The Court, before ruling upon an objection to the admission of this instrument in evidence, inquired of

plaintiff's counsel as to whether it was contended that the defendants knew about the application. Counsel for plaintiff replied, "No, I don't believe they did, but they did know about his Vice Presidency." Whereupon, the Court ruled the instrument inadmissible. (Defts' App. 10).

Raney testified that he had definitely determined to quit his employment with plaintiff prior to writing Mr. Mathis, and that the actual termination of his employment occurred after the receipt by him of a letter from Mr. Benton materially curtailing his authority as an employee. That Mr. Benton accused him of a lot of things and demanded the keys which he, Raney, thereupon threw on the desk and then walked out. Raney later wrote a resignation as Vice President of the corporation, which was accepted. (Defts' App. 11).

Plaintiff corporation handled other lines beside the products of Fischer & Company, including Hamilton furniture, electric cardiogram and basal metabolism equipment, an item known as a microtherm, and an extensive laboratory line. (Defts' App. 12).

No officer of Fischer & Company ever suggested to Raney that he sever his employment with plaintiff (Defts.' App. 12).

Thaddeus G. Benton, attorney for plaintiff, as a witness for plaintiff testified that Raney had misrepresented to him the profits and earning power of the company under Raney's management, that he found Raney was totally unreliable as a manager, that Raney was not to be trusted in a managerial capacity, but that "we could control him strictly as a salesman and we needed his sales power" (Defts' App. 12, 13); that he engaged

Mr. Kane to take over the immediate charge of the business and to do what Mr. Raney had theretofore been doing (Defts' App. 13).

Benton further testified that he made no investigation as to the relation between the company he was buying and H. G. Fischer & Co., Inc.; that he accepted Mr. D. W. Boomhower's—Ed Raney's promises to him in that respect, and that he never saw any written contract there might have been (Defts' App. 14).

With respect to the occasion when Raney surrendered the keys, Mr. Benton testified that he said, "let's have the keys," and that Raney gave him the keys. (Defts' App. 14).

CONTESTED ISSUES.

The trial court having disposed of the case by a finding for the defendants at the close of the plaintiff's evidence, the contested issues essentially are related to the sufficiency of the plaintiff's evidence, and may be stated as follows:

1. Does the evidence establish a breach on the part of the defendants, H. G. Fischer & Co. Inc., and Allan W. Mathis, of any contractual duty to the plaintiff.

2. Does the evidence sustain plaintiff's claim that the defendants deliberately interfered with an alleged contract between the plaintiff as employer and Edward M. Raney as employee, and conspired with Raney to enable Raney to "embezzle" plaintiff's franchise.

SUMMARY OF ARGUMENT.

I.

The contract between the parties was a typical manufacturer-dealer agreement, which either party thereto was privileged to terminate upon one week's notice in writing to the other.

It is apparent that the agreement was terminated by defendant H. G. Fischer & Co. Inc., for the reason that plaintiff's production of business in the territory was inadequate. H. G. Fischer & Co. Inc. was justified in considering the report on the discordant state of affairs of the plaintiff organization and it was no breach of contract for defendant to consider taking such steps as it might deem necessary to protect its interests in the Washington territory.

Defendant H. G. Fischer & Co. Inc. did not violate any duty it owed the plaintiff in giving tentative consideration to the request of Mr. Raney, plaintiff's Vice President and General Manager, that he, Raney, be considered for the Washington dealership in the event it became necessary to terminate plaintiff's franchise. Actually, plaintiff's franchise was not terminated until much later and the Washington franchise was never assigned to him.

II.

The evidence does not sustain the allegation that the defendants interfered with an alleged contract of employment between the plaintiff corporation and its Vice President and General Manager, Ed Raney. On the contrary, the evidence shows that the plaintiff's President, Mr. Benton, was unable to maintain harmonious and satisfactory relations with the corporation's personnel and that, in particular, there was much dissension between Mr. Benton and Mr. Raney and that Mr. Benton finally concluded that Raney was not a competent General Manager, and notified Raney that he had been reduced from General Manager to salesman, whereupon an altercation ensued, during which Mr. Benton terminated Raney's employment by demanding and receiving Raney's keys. The evidence suggests that the failure of the plaintiff corporation to prosecute its business successfully was attributable to the lack of harmony in plaintiff's organization, but there is no evidence whatever indicating that the defendants were responsible in any way for such discord.

PROPOSITIONS OF LAW RELIED UPON.

I.

The evidence does not sustain the charge that defendant H. G. Fischer & Co. Inc. (or Allan W. Mathis, individually) breached a contractual obligation to the plaintiff.

II.

The evidence does not sustain plaintiff's claim that the defendants deliberately interfered with an alleged contract between the plaintiff as employer and Edward M. Raney as employee, or conspired with Raney to enable the latter to "embezzle" plaintiff's franchise.

a. The following elements are necessary to constitute enticement of a servant from his employ:

i. Existence at the time when the inducements are to operate, of the service which the servant is induced to leave;

ii. Knowledge thereof on the part of the defendant; and

iii. Resulting injury to the master.

(30 Am. Jur. p. 60, Section 6)

ARGUMENT.

I.

The evidence does not sustain the charge that defendant H. G. Fischer & Co. Inc. (or Allan W. Mathis, individually) breached a contractual obligation to the plaintiff.

There were two contracts affecting the relationship between the plaintiff and H. G. Fischer & Co. Inc. The first contract (a copy of which was attached to defendant H. G. Fischer & Co. Inc.'s Answer) was in force as between D. W. Boomhower and H. G. Fisher & Co. Inc. at the time the Boomhower business was acquired by the plaintiff.

While a strictly formal assignment of this contract to the plaintiff as the purchaser of the business was not executed, an exchange of letters between the plaintiff and H. G. Fisher & Co. Inc. clearly indicates that the plaintiff requested a continuation of the existing contractual arrangement and that H. G. Fischer & Co. Inc. consented thereto. (Pltf's App. 14, 17).

Nevertheless, plaintiff's counsel failed to offer this contract in evidence and informed the Court that the contract which he claimed had been breached consisted of a letter dated October 12, 1950, in which the defendants undertook to extend "all possible support and cooperation." (Defts.' App. 4).

The letter mentioned by counsel (Pltf's Exh. 28) was H. G. Fischer & Co. Inc.'s response to two letters (Pltf's Exhs. 27 and 29) received from plaintiff after plaintiff's acquisition of the Washington business, requesting a

continuation of the arrangement theretofore existing between the former owner of the Washington business and H. G. Fischer & Co. Inc. Obviously, the pre-existing agreement, which the letter extended and made applicable to the purchaser of the business, thereupon became the contract between the parties, and the letter itself is merely evidence of defendant H. G. Fisher & Co. Inc.'s consent to the substitution of the plaintiff corporation as a party to the contract in lieu of the former individual owner of the business.

Since plaintiff elected not to offer the contract so extended to plaintiff in evidence, the evidence fails to show the contractual relationship of the parties as it existed during the first year of plaintiff's operation of the Washington business. On October 19, 1951 a new contract was executed by H. G. Fisher & Co. Inc. and by the plaintiff corporation. Mr. Benton's signature as President of the plaintiff corporation appears thereon (Exhibit attached to plaintiff's third complaint, amended). Therefore, the record shows only the contractual relationship between the parties from and after October 19, 1951.

The contract of the last mentioned date is a typical manufacturer-dealer agreement with a schedule of authorized discounts attached. The evidence discloses no violation of the defendant manufacturer's obligations under this agreement.

Paragraph 15 of the agreement reserved to each of the parties thereto the right to terminate the agreement upon one week's notice in writing to the other party. The right so to terminate the agreement was not conditioned upon the existence of any particular cause or ground. Defendant H. G. Fischer & Co. Inc. terminated the agreement, exercising the cancellation privilege, on April 25,

1952, and while it was not required to specify the reason for such cancellation, it is apparent that this action was taken for a sound business reason, namely: a radical reduction in the sales of H. G. Fischer & Co. Inc.'s equipment in the Washington territory. In the first quarter of 1952, which preceded the cancellation of the contract, the invoice value of the plaintiff's purchases from H. G. Fischer & Co. Inc. amounted to only $709.00 (Defts' App. 4, 5). Since the territory in question normally produced a much greater volume of business, H. G. Fischer & Co. Inc. was clearly entitled to exercise its right of cancellation and make such other arrangements as deemed advisable to obtain a normal volume of business from the territory.

The statement contained in the H. G. Fischer & Co. Inc. letter dated October 12, 1950 to the effect that all possible support and cooperation would be given to the plaintiff corporation related to the transfer of the then existing contract to the plaintiff, as the purchaser of the Washington business, and indicated nothing more than that plaintiff, as the new owner of the Washington business, might expect the consideration and service normally extended by a supplier to a dealer.

It is true that on March 27, 1951, defendant H. G. Fischer & Co., Inc., in response to a letter it had received from plaintiff's Vice President and General Manager, Ed Raney, reporting a disorganized state of affairs in the Washington dealership, wrote Mr. Raney to the effect that if, as Raney had stated, it should appear that Boomhower, Inc. "bids fair to disintegrate as a proper sales force for our line, and you feel that you could take over the line advantageously yourself," it would be agreeable to defendant to turn over the company's representation to Raney (Pltf's App. 19, Pltf's Exh. 31).

Raney's letter presented defendant H. G. Fischer & Co. Inc. with the prospect of a serious loss of business in the Washington territory. Thus, H. G. Fischer & Co. Inc.'s legitimate interests were involved and it was no breach of duty or business ethics for it to consider taking such measures as might be necessary to secure adequate representation in the territory. However, defendant H. G. Fischer & Co. Inc. did not cancel the plaintiff's franchise until more than a year after its letter of March 27, 1951 to Mr. Raney (Defts' App. 5). After the cancellation of the plaintiff's franchise on April 25, 1952, the territory was not assigned to Mr. Raney but instead was assigned to the District X-ray Company which, in the meantime, had purchased the business and assets of the plaintiff (Defts' App. 5, 6).

II.

The evidence does not sustain plaintiff's claim that the defendants deliberately interfered with an alleged contract between the plaintiff as employer and Edward M. Raney as employee, or conspired with Raney to enable the latter to "embezzle" plaintiff's franchise.

The evidence contains no substantiation whatever for the charge that the defendants interfered with the alleged contract of employment between the plaintiff and its Vice President and General Manager, Ed Raney. The evidence abundantly shows that there was a lack of harmony between Mr. Thaddeus G. Benton, President of the plaintiff corporation, and Mr. Raney, and that there was constant dissension between them. Raney explains the lack of harmony on the ground that the plaintiff's President was without experience in the medical equipment field and sought to operate the business as an ordinary commercial enterprise rather than a business catering to members of the medical profession and hos-

pitals. In the end, Mr. Benton, President of the plaintiff corporation, notified Mr. Raney by letter that Raney's authority was to be materially curtailed and his status reduced to that of a mere salesman (Defts' App. 11, 12). A discussion between Mr. Benton and Raney, which followed Raney's receipt of this letter, became quite heated and Benton demanded that Raney surrender his keys (Defts' App. 11). The keys were immediately surrendered by Raney and Raney thereafter presented his formal resignation as a Vice President of the corporation (Defts' App. 11).

It is apparent from the evidence that although Raney had been disgruntled for a long period of time, he did not actually resign his position with the plaintiff corporation but instead that his employment by the corporation was terminated by the corporation's President, Mr. Benton.

Mr. Raney's application for his position with the plaintiff appears to have been in the form of a letter dictated by Mr. Benton shortly before the transfer of the Washington dealership to the plaintiff corporation (Defts' App. 7). This instrument may or may not have become a contract as between plaintiff and Raney but, at any rate, the trial court refused to admit it in evidence because there was no showing that the defendants had any knowledge of its existence and therefore it could not have been binding upon them (Defts' App. 11).

However, if, as the plaintiff contends, Mr. Raney was employed as a General Manager for a three year term, it would appear that the plaintiff forfeited its right to retain Mr. Raney in its employ after notifying him that his status had been reduced from General Manager to salesman.

Mr. Thaddeus G. Benton, attorney for plaintiff and its former President, testified that Raney had misrepresented to him the profits and earning power of the company under his management and that he found that Raney was totally unreliable as a manager, could not be trusted in a managerial capacity, but, nevertheless, he could be controlled strictly as a salesman (Defts' App. 12, 13).

Mr. Benton further testified that after he had reached the foregoing conclusions, he engaged Mr. Kane to take over the immediate charge of the business and do what Raney had theretofore been doing (Defts' App 13). It thus appears from the testimony of the former President of the corporation that, contrary to plaintiff's claim, the services of Mr. Ed Raney were not indispensable to the plaintiff and that, in fact, plaintiff hired another man to take over the duties for which Mr. Raney had been employed and attempted to reduce Raney to the position of a mere salesman.

There is nothing whatever in the evidence which shows, or suggests, that the defendants, H. G. Fischer & Co. Inc. and Allan W. Mathis, its President, were even remotely responsible for the discord and dissension which developed between Mr. Thaddeus G. Benton, President of the plaintiff corporation, and that corporation's employees. Whether Mr. Benton or his several employees, or whether both Mr. Benton and his employeees, were to blame for the lack of harmony in their association is a matter which in no way concerns the defendants. However, we may suggest in passing that if the plaintiff corporation was being competently managed, it is strange that such general discord and dissatisfaction among the employees should have existed. The evidence clearly indicates that the failure of the plaintiff corporation to prosecute its business profitably is attributable to its failure to main-

tain proper and satisfactory relations with its salesmen, and there is not the slightest justification for the plaintiff's attempt to charge the defendants with the responsibility for the plaintiff's own inadequacies in management.

If plaintiff's theory is that the defendants induced Raney to leave its employ, it was incumbent upon plaintiff to prove: (1) existence at the time when the alleged inducements are supposed to have operated, of the service which the servant was induced to leave; (2) knowledge thereof on the part of the defendants; and (3) resulting injury to the master. (30 Am. Jur. 60, section 6). Actually, the evidence does not show that the defendants induced Raney to leave the plaintiff's employ but merely shows that Raney had already determined to leave his employment before he reported his dissatisfaction with the conditions in the Washington dealership and inquired as to the possibility that the dealership might be given to him.

Moreover, the evidence shows that such consideration as the defendants may have given to Raney's suggestion that he be g. nted the Washington dealership, in the event defendant H. G. Fischer & Co. Inc. found it necessary to cancel the plaintiff's franchise, did not materialize and that the plaintiff, by reason of its own dissatisfaction with Raney's services, terminated the latter's employment. While it is true the defendants knew that Raney was the Vice President of the plaintiff corporation, the evidence wholly fails to show that the defendants had any knowledge of an alleged employment contract between the plaintiff as employer and Raney as an employee (the supposed employment agreement offered in evidence by the plaintiff was properly refused by the Court on the ground that the defendants had no knowledge of the exist-

ence of the document). Under the circumstances, the terms of the application and the question of whether it was ever converted into a binding contract between the plaintiff and Raney were issues which were immaterial in the present action.

The plaintiff was not damaged by the tentative consideration given by defendant H. G. Fischer & Co. Inc. of Raney's suggestion that the Washington dealership be granted to him, inasmuch as the evidence shows that such action was never taken and that the dealership, in fact, after the lapse of a considerable period of time, was assigned to another corporation in which Raney had no interest.

CONCLUSION.

We submit that the trial judge was fully justified in sustaining the defendants' motion for a finding at the close of plaintiff's evidence. Since the trial judge heard the case without a jury, he was entitled to weigh the evidence if he deemed it necessary to do so but, in any event, the plaintiff's evidence was wholly insufficient to sustain its alleged cause of action.

It appears that during much of the period of time that plaintiff's President, Mr. Benton, and plaintiff's Vice President and General Manager, Mr. Raney, were associated together, much bitterness was engendered as between them but there is nothing in the evidence which even suggests that the defendants were in any manner responsible for this dissension.

It is true that at one time Raney reported to the defendants to the effect that the plaintiff's sales organization was about to disintegrate and requested that he,

Raney, be considered for the Washington franchise. The evidence, including that of plaintiff's President, Mr. Benton, materially supports the report of conditions which Raney made to defendant H. G. Fischer & Co. Inc. and, under the circumstances, it would seem that defendant H. G. Fischer & Co. Inc.'s legitimate business interests in the territory justified their considering the possibility of effecting a change in the company's representation in that area. However, despite the tentative consideration given Raney, he continued in the plaintiff's employ for approximately a year thereafter until he was actually discharged by the plaintiff.

The Washington dealership was never assigned to Raney but instead was assigned to another corporation which, in the meantime, had acquired the business and assets of the plaintiff. Ultimately, Raney was employed by defendant H. G. Fischer & Co. Inc. in its Franklin Park, Illinois, office in a capacity which in no wise affects the Washington franchise.

We submit that the difficulties which the plaintiff corporation experienced during the period it was active in the medical equipment business, involving many lines in addition to H. G. Fischer & Co., Inc.'s equipment, was occasioned by internal dissension and unsatisfactory employer-employee relations, with respect to which the defendants in this case were not involved in the slightest degree.

Respectfully submitted,

Russell B. Burt,
Robert C. Pierce,
Attorneys for Defendants-Appellees.

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APPENDIX.

Witness: ALLAN W. MATHIS, one of the defendants, called by Plaintiff:

I am President of H. G. Fischer & Company. In October, 1950, I was acquainted with D. W. Boomhower * * * I was not acquainted with the details of that business. We had a regular sales contract with D. W. Boomhower, wherein he sold our equipment in the Washington territory.

He could sell in other territories and get a lower rate of discount, or people in other areas could sell his territory and get a lower rate of discount . . . The territory generally was a trade territory contiguous to Washington.

"Q. Including the States of Virginia and Maryland?

"A. No, sir. Not entirely. The territory was divided by counties and it did include those counties contiguous to Washington."

"Q. By what means did you ascertain the fact that the plaintiff corporation was succeeding to the business theretofore conducted by D. W. Boomhower?

"A. The first I knew about it was when I received a letter signed by Don Boomhower, Vice President of Boomhower, Inc., that the D. W. Boomhower Company had been sold to you and others of interest.

"Q. You are now pointing to Plaintiff's Exhibit 27, are you not?

"A. Yes, sir."

"Q. Not until October, 1951, did you request that Boomhower, Inc. sign any contract, did you?

"A. No, you took over the old one, the old contract.

"Q. * * * By what means did the plaintiff take over the old one?

17 "A. Your Vice President there signed the letter and said everything is going to be the same. The Vice President of the company, and he was the former owner, I assumed, of course."

I did not ask that company to sign a contract until I changed all contracts we had with all dealers, in October, 1951.

I mean, you operated under the original Boomhower contract. You accepted the benefits, and I assumed from what your Vice President said that you understood it, and all.

18 I have known Mr. Ed Raney for 20 or 25 years.

19 I did not know that Mr. Raney would be in full charge of the Boomhower business in Washington. I assumed that Boomhower himself was going to stay on there.

20 "Q. Now in January, 1951, did Mr. Raney come to Chicago and meet you?

"A. He came to Chicago. Now, whether I discussed much with him—he came up to the sales meeting."

"Q. At that time you knew Mr. Raney was on a profit-sharing basis with the company, did you not?

"A. I did not."

25 I did not report to the Plaintiff those letters (Plaintiff's Exhibits 30 to 34). I assumed the facts contained in those communications were true, but I didn't know.

26 "Q. Do you know, Mr. Mathis, Mr. Raney was seeking to obtain the franchise for his own personal use?

"A. The letter speaks for itself."

38 Mr. Burt:

"Your Honor, I want to make an objection to this line of interrogation on the ground that that franchise was never taken away from the plaintiff company and given to Mr. Raney. So even if it was threatened, if that is the correct interpretation of these letters, it amounted to nothing because it didn't happen. So how can it be material in this case?"

The Court:

"I don't know what the point is that he is trying to make."

39 "Q. Again inviting your attention to Plaintiff's Exhibit 34, is it true that at that time and on that date, you had made up your mind to give the official franchise to Ed Raney?

"A. That was a letter written by my secretary to Raney in which were the 'ifs' to materialize that were in the previous correspondence, yes.

"Q. What 'ifs' do you speak of, Mr. Mathis?

40 "A. The 'ifs' if Boomhower, Inc. went to pots, if you lost all of your sales force, and those things that he mentioned."

41 But if he had financed himself and said to you, Mr. Mathis, "Now I am ready for this franchise to take on myself," you were then and there prepared to do that?

"A. If your business dropped off to the point where we could no longer do justice to the company by continuing to do business with you, why, then I would have done it. I have got duties to the company."

47 We make changes in the territory whenever we feel it is to the company's advantage to do it, because if it is not being worked, if we are not getting

business from the territory, if there is some way of otherwise getting it, we would have to do it, of course. You had more territory than you worked."

55 The Court:

"Is there anything in the contract or is there anything in the law which prevented this gentleman from dealing with Mr. Raney or anybody else?"

Mr. Benton:

"It was a breach of their contract, Your Honor.

The Court:

"Where is that contract?"

56 Mr. Benton.

"That contract consists of a letter of October 12, which has been marked for identification.

The Court:

"Which restricts their activities insofar as Raney is concerned?"

Mr. Benton:

"No, your Honor, but it expresses affirmatively the expectancy of the defendants to lend all possible support and cooperation, if I remember the words."

The Court:

To whom?

Mr. Benton:

To the plaintiff, Boomhower, Inc.

The Court:

To the corporation. Well, there isn't anything in that letter which says they can't deal with Raney.

63 The volume of our products purchased by Boomhower, Inc. (reading from a statement):

65 In 1950 they bought $28,094.12. The fourth quarter of 1950 they bought $6,108.00, and in the first quarter of 1951 they bought $9,558.00; in the second quarter they bought $13,322.00; $6,691.00 in the third quarter, and $2,930.00 in the fourth quarter. In the

first quarter of 1952 they bought $709.00. These figures are the prices actually paid to Fischer & Company.

66 In April, 1951, I was in Washington.

"Q. What explanation, if any, did Mr. Raney make to you as to why he had not proceeded to take on the franchise for himself?

67 "A. He made no explanation along that line because we never consummated the deal. He never had a chance to. There were a lot of 'ifs' that never materialized."

He never had a franchise from me in that territory.

68 In October, 1951, I submitted a new regular form of contract to Boomhower, Inc. for their signature.

• • •

The Court:

71 Let me see. Exhibit B, attached to your Amended Complaint, is a copy of this contract you are talking about?

Mr. Benton:

Of October, 1951.

Mr. Burt:

That is correct.

Mr. Benton:

"Q. Now when, if at all, did you cancel that contract, Mr. Mathis?

72 "A. Which contract?

"Q. The contract of October 1951.

"A. It was cancelled April 25, 1952.

"Q. And who was the franchise given to at or about that time for the Washington area?

"A. The District X-Ray Company."

• • •

That Company was headed by Dennis Kane and a man named Kramer. As I understood it, they left Boomhower, Inc. and formed the District X-Ray Company, got the line of North American, Philips X-Ray equipment, and had been selling North American, Philips X-Ray Company, for, I should say, a year or more. I don't know for sure, but my recollection is it was a year or perhaps longer. But in all events, they were already set up in business, had a line of X-ray equipment, and were selling X-ray equipment. That is the same firm that you sold the assets of Boomhower, Inc. to, I was told by Mr. Kane.

73 "Q. Did he (Kane) endeavor to acquire for himself or for District X-Ray Company the franchise of Fischer & Company to sell in the Washington area?

"A. Not while he was employed or working with Boomhower, Inc. He tried after he formed the District X-Ray Company, he and a man named Kramer, then he did try to get our line and he called me on the telephone and I told him I wasn't in a position to do any business with him."

• • •

I never agreed to give it to him until after he had cancelled the contract with Boomhower, Inc. or after I had served notice on them of my desire to cancel it.

82 Witness: EDWARD M. RANEY, called by Plaintiff:

I am employed by H. G. Fischer & Company as Field Engineer, write construction books, write sales propaganda.

96 "Q. Do you recall that on April 4th you turned in your keys to the plaintiff corporation?

"A. You demanded the keys and I gave them to you."

98 When did you first agree to go to work as an employee of Fischer & Company?

"A Mr. Mathis came to Washington and I believe it was on a Thursday. I was working for Allen (S. Allen Company) at that time. He called my 99 home and I wasn't there. When I got home, my wife gave me the message. I met him at the Reilly Hotel. On Thursday night we discussed the matter and I told him at that time that I would have to discuss it with Mrs. Raney."

• • •

99 On Friday morning I talked to him again at the hotel and I agreed to go to work.

100 Plaintiff's Exhibit 44 for identification is a copy of my application for employment (with plaintiff corporation) which you dictated in the Wardman Hotel. You didn't dictate it, you wrote it yourself on a typewriter and I signed it.

101 Plaintiff's Exhibit 45, dated October 2, 1950, bears my signature. It ties in with the first one. That was an amendment to paragraph 3, or something like that.

Mr. Benton:

May I offer these documents in evidence as proof of his relationship?

102 The Court:

You may offer them in evidence. As to what they prove, that is something else.

Mr. Burt:

I object to this so-called letter of application for a position.

• • •

103 Counsel has referred to this document apparently as a contract of employment between the witness Raney and Boomhower, Inc. This, however, is in the form of a letter which the witness testified Mr. Benton dictated, the letter being addressed to Mr. Benton himself, and it indicates apparently the terms and conditions upon which the witness would accept employment with the corporation which was not then in existence.

104 The Court:

He spoke of it once as a contract and another time as an application. Apparently it is an application for employment.

Mr. Benton:

The witness testified it became operative with the acquisition by Boomhower. I offer it in evidence.

The Court:

I don't understand that part of it. * * * How is 105 that material to this law suit?

Mr. Benton:

By showing the fiduciary relationship of this gentleman, your Honor, to Boomhower, Inc.

The Court:

Suppose it was a fiduciary relationship, couldn't he end it?

Mr. Benton:

He couldn't end it because, Your Honor, I was about to read the part of the agreement which provided he was contractually bound under it to serve for three years and therefore, if he had ended it, it would have been a breach of contract. That is the issue, whether this defendant corporation or Mr. Mathis did anything.

The Court:

Did what?

Mr. Benton:

Did anything toward causing Mr. Raney to breach his contract.

The Court:

The testimony here is you fired him.

• • •

106 Mr. Benton:

There was a written resignation sent to the plaintiff.

The Court:

Was the resignation accepted?

Mr. Benton:

Yes, Your Honor.

The Court:

Then that ended his employment, didn't it?

119 "Q. Calling your attention to the provision in your application of September 6, 1950, and I quote: 'I shall—'"

Mr. Pierce:

I object to counsel referring to that document or quoting from it because, as I understand the Court's ruling, it was not permitted in evidence.

120 Mr. Benton:

I didn't so understand it.

Mr. Pierce:

This, if Your Honor please, is a so-called letter of application.

The Court:

You objected to it and I sustained your objection?

Mr. Pierce:

That is correct. Now counsel is wanting to quote from it and interrogating the witness on the basis of a barred document, and I object.

• • •

The Reporter:

There is no marking on it at all, Your Honor, except the identification mark.

The Court:

It was not admitted?

The Reporter:

No, sir.

The Court:

You objected to it and I sustained your objection.

Mr. Pierce:

That is correct, Your Honor.

121 • • •

Mr. Benton:

• • • but it is alleged and there is evidence in this record to the effect that these defendants by their conduct did aid and abet Mr. Raney in breaching his contract to Plaintiff.

The Court:

Do you contend that they knew anything about that contract?

Mr. Benton:

Oh, yes. • • • not the precise terms of it, Your Honor.

The Court:

You say they knew about that application?

Mr. Benton:

No, I don't believe they did, but they knew about 122 his vice presidency.

The Court:

Of course they knew about his vice presidency but they didn't know anything about that document that you have in your hand, so how could they be bound by it?

• • •

The Court:
You object to it?
Mr. Pierce:
We object to it.
The Court:
I sustained the objection and that is still the ruling.

123 Witness: EDWARD M. RANEY, cross-examined:

I had very definitely determined to quit prior to writing the first letter to Mr. Mathis in which I commented upon the conditions of my employment by the plaintiff corporation. I had not previously communicated with Mr. Mathis or any other officer of the Fischer company with regard to my dissatisfaction with my employment.

126 The occasion when Mr. Benton demanded the keys occurred in the offices of Boomhower, Inc. April 4th. Mr. Benton accused me of being a crook. He accused me of a lot of things, and he demanded my personal correspondence which I refused to give him. He got ~~a little~~ wild about it and he said, "then turn
127 in your keys." So I threw the keys down on the desk and walked out of the place.—I was the Vice President. When I wrote that letter, I resigned as Vice President of the corporation.—

128 At the time I wrote the first letter to Mr. Mathis we (Mr. Benton and witness) were pretty much at odds end.

129 * * * but I will say there was constant contention from the middle of March on. Finally, around the first of April, I got a letter from him stating that, from here on out, he would sign all checks; take no more business from Otteson and Lox unless approved

by him, and don't order any more goods. In other words, all authority was removed from me.

"Q. In your letter to Mr. Mathis you indicated the possibility that the sales personnel would disintegrate?

"A. It was. I think we had lost—well, we had a man by the name of Joe Whitehead, and Joe was gone. I think it resolved down to about all we had left was Kane, Sissel and Otteson and Lox, and he had cut out Lox in this letter of April 1st.

"Q. Did Boomhower Incorporated handle any other lines besides the products of Fischer & Co.?

"A. Yes, we handled the Hamilton Furniture. We
130 handled the Electric Cardiograph. We handled basal metabolism equipment. We had quite an extensive laboratory line. We handled an item known as a microtherm made by Raytheon Company. And we had quite a general line.

"Q. Did Mr. Mathis or any other officer of the Fischer & Company ever suggest to you that you resign or sever your employment with plaintiff corporation?

"A. No, sir. I never had any contact with Mathis until after Benton and I got into it.

THADDEUS G. BENTON, attorney in behalf of Plaintiff, called as a witness for plaintiff:

183 He (referring to Raney) had misrepresented to me the profits and earning power of the company under his management. He had shown ability as a manager in the business; but I found from my investigation that he was totally unreliable as a manager, and that he was not to be trusted in a managerial capacity, but that we could control him

strictly as a salesman, and we needed his sales power. Therefore, I wanted to preserve that sales power in hope of saving the business and pulling it through.

"Q. What else did you do when you learned of this?

"A. I was—I—I engaged thereupon Mr. Kane to take over the immediate charge of the business and do what Mr. Raney had theretofore been doing • • •"

203 *Cross Examination.*

You testified here that you considered Mr. Raney an invaluable man?

"A. I did not use the word, 'invaluable', if I recall rightly."

204 "Q. Well, your complaint is predicated in large part upon the theory that Mr. Mathis or his corporation interfered with Mr. Raney's employment by you, and that that very seriously disrupted your business?

"A. Yes, we regarded Mr. Raney as a very important manager."

"Q. But a while ago you testified that you discovered that Mr. Raney was wholly unreliable and that he did not possess managerial ability and that you did not want him to continue in your employ except under a new contract which reduced him from manager to salesman, is that right?

205 "A. After I investigated in April, I so found, yes."

I first met Mr. Mathis personally, I believe, in November or December of 1950 after I had purchased the business.

206 * * * I made no investigation as to the status of the relation between the company I was buying in Washington and the manufacturer in Chicago; I accepted Mr. D. W. Boomhower's—Ed Raney's promises to me in that respect.

"Q. Well, you knew that Mr. Boomhower, a proprietorship, was working or operating under a franchise agreement with Fischer, did you not?

"A. I did not know what the agreement was. I knew—

"Q. Well, you were buying a business. Did you not investigate the nature of that business' relationship with its chief supplier?

"A. I never saw or investigated the firm or any written contract that there might have been, Mr. Pierce."

* * *

208 "Q. Well, with regard to the Fischer line, you
209 depended not upon anything that Fischer told you but merely upon what Mr. Boomhower told you, is that correct?

"A. That's correct, yes.

"Q. And you did not even know there was an existing dealership contract in writing?

"A. I did not know there was any such writing."

210 "Q. Now, you demanded from Mr. Raney the keys on the occasion you mentioned?

"A. I said, 'Let's have the keys.'

"Q. And he gave you the keys?

"A. Yes."

Office
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 935

BOOMHOWER, INC.,
Petitioner,

vs.

H. G. FISCHER & CO., INC., and
ALAN MATHIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1957.

No. .....

BOOMHOWER, INC.,
Petitioner,

vs.

H. G. FISCHER & CO., INC., and
ALAN MATHIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above action January 24, 1958, affirming the judgment of the United States District Court for the Northern District of Illinois finding for the defendants upon defendants' motion for judgment at the close of plaintiff's case.

OPINIONS BELOW.

The opinion of the District Court is not reported in Federal Supplement, but appears at pages 5-7 of Petitioner's separate appendix. The opinion of the United States Court of Appeals appears in 251 F. 2d p. 611 (See at Appendix hereto, p. A1).

JURISDICTION.

The judgment of the United States Court of Appeals is dated and was entered on January 24, 1958. The order of the United States Court of Appeals denying petitioner's petition for rehearing is dated February 20, 1958, and simply reads: "It is ordered by the court that the petition for rehearing of this cause be, and the same is hereby denied."

Section 2101 (c) and Section 1254 of Title 28, U. S. C. are believed to confer jurisdiction on this court to review the judgment by writ of certiorari.

QUESTIONS PRESENTED.

1. Whether the courts below totally ignored controlling principles of law and equity that properly fasten liability upon defendants, as manufacturers, for (a) the breach of their contractual undertaking with petitioner to give "ALL POSSIBLE SUPPORT AND COOPERATION" to petitioner as their exclusive franchise dealer in Washington, D. C., Virginia and Maryland, by aiding and encouraging petitioner's vice president, manager and fiduciary to embezzle petitioner's said franchise, and to sabotage and appropriate petitioner's employees; and for (b) aiding and

encouraging the breach by petitioner's vice president and fiduciary of his contract obligation to serve petitioner as its vice president-manager on a profit sharing basis for three years—all with the result that plaintiff's business was ruined?

2. Whether the decisions of the courts below were controlled erroneously by philosophical and psychological considerations, and not by law and equity?

3. Whether the legal conclusions of the Court of Appeals are grossly contradictory of the facts found by the court, and in disregard of fundamental law?

Petitioner most sincerely urges that every principle of law, equity and morality compels an affirmative answer, and that the decision below is a travesty upon justice, as shall be shown by the facts, as found by the Court of Appeals.

STATEMENT OF THE CASE.

Petitioner, a Delaware corporation, sued the respondent H. G. Fischer & Co., Inc., an Illinois corporation, and its president Mathis, a resident of Illinois, in the United States District Court for the Northern District of Illinois, for damages for breach of contract and for iliegal interference with petitioner's contract with its vice presid[illegible], one Raney.

Jurisdiction of the court was unquestioned, based on Section 1332, Title 28, U. S. C.

Petitioner seeks to recover $36,592 as damages under three separate and alternative causes of action. The first charges defendants, manufacturers, with having breached their contract with petitioner as their distributor and sales agent to lend petitioner ALL POSSIBLE SUPPORT AND COOPERATION in its representation of them, by conniv-

ing with its vice president Raney in his purpose to embezzle its franchise with defendants. The second charges that defendants maliciously interfered with Raney's three-year contract of employment as petitioner's vice president and manager. The third cause is trespass on the case charging that defendants conspired with plaintiff's fiduciary, Raney, to take away its property rights under its contracts with defendants, and give them to Raney.

As the essential facts found by the Court of Appeals (although incomplete) prove the basic allegations of the complaint, and require affirmative answers to the legal questions presented, there is no need to review the allegations of the complaint (Pl's separate App. p. 8; amended complaint, R. 37).

Facts Found by Court of Appeals.

Respondent H. G. Fischer & Co. (hereinafter called "Fischer") manufactures medical equipment. Respondent Mathis is its president.

Petitioner was organized in October, 1950, by T. G. Benton, a lawyer, to acquire, and did acquire, the business and assets of D. W. Boomhower who had acted as exclusive sales representative of Fischer in the distribution and servicing of its products in Washington, D. C., and most parts of Virginia and Maryland. T. G. Benton became president, and one Ed M. Raney and D. W. Boomhower vice presidents. Benton was without experience in this business, and placed Raney "in full charge of petitioner's operations".

D. W. Boomhower as vice president of petitioner informed Fischer by letter to Mathis of October 6, 1950, of petitioner's organization and its purchase of his business, and supplied the names of its officers, stating that "*Raney would remain in full charge of the business*", and "requesting Fischer to write plaintiff assuring it of the continuation of 'our sales franchise with you and your continued *sup-*

port and cooperation'". By a second letter, Fischer was requested to assure petitioner of the same dealer and cash discounts as under the former ownership, and that future advertising sent out by Fischer for this territory be under plaintiff's name (Ptr's. separate App. pp. 14-17).

October 12, 1950, Fischer by Mathis acknowledged those two letters, offered petitioner its congratulations and best wishes for success, and stated that they "certainly expect to extend to Boomhower, Inc., *all possible support and cooperation* and extend to them the same discounts and terms that we have extended to D. W. Boomhower Co." (Ptr's. separate App. p. 18). On the strength of that exchange of correspondence petitioner and respondents "continued the supplier-dealer arrangement" that previously existed with D. W. Boomhower.

In March, 1951, Raney wrote defendants from his residence address, clandestinely, asking defendants to "consider this letter and its contents completely confidential." He referred to a conversation he had had with Mathis when in Chicago on petitioner's business in January, 1951, in which Raney intimated that the petitioner's situation might not be entirely satisfactory and had inquired about the possibility of his taking over the Fischer franchise exclusively in the Washington, D. C., area. He informed defendants that Mr. Benton had no conception of the business and had created dissension among salesmen. He noted that he foresaw a complete disintegration of the sales organization, and that he could take a key salesman or two from petitioner and double the Fischer business in that area. He advised that he had capital available to handle the franchise in that area and "can carry on in exactly the same manner as we have in the past." He asked defendants: "Knowing you as I do, Alan, and your sense of loyalty I will ask a straight question. *Will you let me have this territory ex-*

clusively on my own and take it away from this arrangement as of the present? Please advise me at my home address above." (Ptr's. separate App. p. 18).

That letter evidenced to defendants the complete and unqualified criminal purpose of Raney to embezzle his employer's rights, and his total infidelity. Such perfidy was first expressed in January, 1951—four months after becoming petitioner's vice president under a three year contract on a profit sharing basis.

The letter was perfect notice to defendants of Raney's criminal purposes to embezzle his employer's property rights.

Defendants replied to Raney's letter of March, by letter of March 27, 1951, addressed clandestinely to Raney's residence address, thus joining Raney in his clandestine purposes. They informed Raney that "If, as you state in your recent letter, it appears that Boomhower, Inc. as it is presently set up bids fair to disintegrate as a proper sales force for our line and you feel that you can take over our line advantageously *yourself, we, of course, are agreeable to turning our representation over to you.* * * *". As hereinafter shown, defendants never attempted to confirm any possible disintegration of petitioner, but unconditionally promised the franchise to Raney.

Defendants then outlined the exclusive territory they would give Raney, being substantially the same as then possessed by petitioner. The letter concluded:

> "*Our offering* the above territory to you and *offering you* our line, also your retention of the territory, would be predicated upon your handling no items that would be competitive to ours and getting what we would consider a satisfactory and representative volume of business from the territory.

> *"We will be ready to proceed along the lines under discussion when we have heard further from you."* (Ptr's. separate App. p. 19).

That letter evidences the unqualified offering of petitioner's franchise to petitioner's vice president, Raney.

Raney, again from his residence address and clandestinely, replied by letter of March 31, 1951, stating that *"I am ready to move"*, *that he could retain certain of petitioner's salesmen*, and that:

> "How much time will you require to notify Boomhower, Inc.—which is only fair—of the cancellation of their franchise? *I certainly do not wish it to be said at any time that there was any 'schullduggery' (sic) in the transaction."* (Ptr's. separate App. p. 21).

That letter registered deep conviction by Raney and further notice to defendants that he was engaged in an illegal purpose, and was further, express notice to defendants of the fact that Raney was appropriating to his own use petitioner's property rights, with the full aid and affirmative cooperation of defendants.

April 1, 1951, Raney wrote D. W. Boomhower in Florida, again from his clandestine residential address, expressing a hostile attitude toward Mr. Benton, and asking for $5,000 capital for a new corporation Raney proposed to form and *"personally control to take over the Fischer business from plaintiff."* He informed D. W. Boomhower that *he could take all petitioner's employees with him.* D. W. Boomhower declined to participate (Ptr's. separate App. p. 25).

On April 4, 1951, petitioner's president Mr. Benton, having learned of Raney's purposes to embezzle its franchise, by the "squealing" by Kane (Raney's confederate), demanded that he "turn in his keys", but he did not resign

until April 11, 1951. Petitioner's employe Kane had "squealed" on Raney, after having conspired with him to finance him in his enjoyment of petitioner's franchise. Petitioner had demanded that Raney exhibit his clandestine correspondence with defendants which he refused to do (Raney, Tr. pp. 96, 175, 202-3, 210).

The next day, April 5, 1951, Raney again wrote defendants from his residence stating that "This affair has become an open brawl!", that defendants would receive a letter from Mr. Benton stating his "side of things", impugning Kane who had "squealed" on him, and declaring:

> "Ordinarily, Alan, I would not stoop to levelling on a man, but in this case he (Kane) and Benton feel that they can put one over on Pappy but he has lived too long for that.
>
> "Knowing you to be an honorable man, Alan, *I am going to ask you to respect* ALL OUR CORRESPONDENCE AS CONFIDENTIAL AND NOT OPEN TO THE SCRUTINY OF OTHERS. IF BENTON REQUESTS COPIES PLEASE CONSIDER THE CONFIDENTIAL NATURE OF MY LETTERS—AT LEAST —AND REFUSE HIM.
>
> "Holah was in today and will carry on but not with the Kane-Benton combination.
>
> "My reason for all of the foregoing is that I worked under a profit sharing arrangement and I do not propose to let him in his sly legal way try to chisel me out of any just earnings on a technicality." (Ptr's. separate App. p. 22).

(Instead of being entitled to a share in the profits, because they were non-existent, Raney had failed even to earn his drawing account at the rate of $6500 per year, as required by his contract with petitioner. Rickman's deposition, pp. 13-18, Rickman's Ex. 15.)

Such letter is a complete confession of Raney's perfidy, his infidelity, his criminal purposes, and his confirmation to defendants of such illegal purposes. And defendants persevered in their purpose to give the franchise to Raney, and take it away from petitioner, in violation of their contract, and in violation of their duty not to interfere with petitioner's contract rights with Raney.

> (That letter to defendants proves unmistakably the gross error of the court in concluding that "There is no showing * * * that defendants even knew anything about the terms" of Raney's agreement with petitioner. And Mathis freely admitted his knowledge, in early April, a least, of Raney's interest in petitioner's profits, and he had been informed in October 1950, that he was the vice president of petitioner, and in full charge of the business (Tr. 37). And Raney freely confessed that Mathis knew the arrangements he had with petitioner (Ex. 54, pp. 90-92).)

With all such knowledge, defendants by further letter to Raney of April 9, 1951, again addressed to his residence clandestinely, confirmed their offer of petitioner's franchise to Raney and stating that "About one month's notice to Boomhower, Inc. would be required." (Ptr's. separate App. p. 24).

The foregoing is proof positive of defendant's conspiracy with petitioner's vice president and fiduciary to enable Raney to embezzle petitioner's franchise, and to appropriate to his own use petitioner's employees.

Raney was unable to raise the capital required to organize his proposed dealer corporation, because of his breach with Kane, and Kane's "squealing" on his purposes, and his inability to induce D. W. Boomhower to help him; and, as a consequence, Fischer could not conclude its purpose to give him petitioner's franchise (the reasons being hereinafter shown). (But the harm had been done to peti-

tioner's business, and its ruination was a direct result of all that defendants did with Raney.)

Raney was obliged to resign on April 11, 1951, and he then went to work for Fischer as an assistant to Mathis.

Dennis Kane (who had squealed on Raney) succeeded Raney as a petitioner's vice president, without knowledge by petitioner that he too had been engaged in Raney's illegal purposes. He remained only until late July, 1951, when his dishonesty was disclosed. Kane was followed in order by two of petitioner's salesmen, and none was successful.

Petitioner continued to represent Fischer (except that as a direct consequence of Raney's illegal purposes a Virginia representative was able to acquire from Fischer the franchise to sell its products in Virginia, which franchise was taken away from petitioner), and as of October 5, 1951, the parties executed a formal contract covering the remaining territory. Fischer cancelled that contract on April 25, 1952, and gave the franchise to District X-Ray Co. headed by Kane and others.

Grossly Erroneous Legal Conclusions by Court Below.

Despite such facts so freely found by the Court of Appeals, that alone show conclusively the liability of defendants, the court committed the most startling, erroneous conclusions, that, as a matter of law, the evidence was insufficient to sustain petitioner on any of its theories, that there was "no evidence that defendants breached any of their contractual obligations to plaintiff as defined in the October, 1950, exchange of letters or as formally set out in the contract of October, 1951", that "there is no showing that defendants interfered with Raney's contractual employment with plaintiff, or that defendants ever knew anything about the terms of any such agreement", that "we

find no evidence of any conspiracy between defendants and Raney to enable Raney to embezzle plaintiff's franchise and steal plaintiff's employees", and that petitioner brought the suit against "the wrong people", meaning that it should have been brought against Raney alone—a fallacy.

Such conclusions are gross contradictions of the plain facts found by the court, and could not be sustained even if philosophy and psychology were the test of actional wrongs, instead of the exclusive legal and equitable principles that control. Morality alone compels the opposite conclusions.

Additional Facts, Not Mentioned by the Court of Appeals but Proved Unmistakably by the Evidence.

While the foregoing facts found by the Court of Appeals prove abundantly the actionable wrongs as matter of law, the following additional facts (not mentioned by the court, but not disputed) confirm beyond possibility of doubt the actionable wrongs by defendants, and the gross errors of law by the Court of Appeals:

Defendants knew full well from all the above described correspondence with Raney that Raney was petitioner's trusted vice president, manager, and fiduciary; and Raney had testified in another action that respondent Mathis knew substantially the arrangements he had made with petitioner (Ex. 54, pp. 90-92). Defendants knew that Raney had been engaged for a three-year term as petitioner's vice president and manager with an interest in the profits of the business, and Mathis had stated to petitioner that it could rely on Raney (Tr. p. 185; Ptr's. separate App. p. 23).

The Fischer products represented a substantial portion of petitioner's business (Tr. p. 172) and was the most important line of merchandise petitioner sold, and the loss of any

part of the franchise would certainly have been detrimental to the business (Brown dep., pp. 31-34).

Defendants' undertaking to give petitioner "ALL POSSIBLE SUPPORT AND COOPERATION" was in return for the reciprocal undertaking of petitioner to sell defendants' equipment, to service it (including the Fischer products already sold in the area), and to take care of physicians in the area in manner as would be a credit to all parties, all at petitioner's expense (Tr. pp. 17-18), so that there was ample consideration for defendants' contract with petitioner.

Raney had testified in another action that Mathis "ALSO TENDERED TO ME VOLUNTARILY, if I was leaving Boomhower, how about considering the Washington territory?" (Ex. 54, pp. 24-25, 37-38, 94). So that defendants were a guiding spark in Raney's infidelity.

Raney had conspired with Kane, for Kane to supply the capital for the operation of the franchise when Raney should acquire it (Ex. 55, pp. 75, 104, Ex. 54, pp. 26-27, Tr. pp. 93-96, 142); but Kane squealed on Raney's illegal purpose (Ex. 55, pp. 105, 108-9).

In March, 1951, Raney, well knowing that petitioner had engaged one Lox of Virginia as a salesman (Lox dep.; Tr. p. 190; Ex. 54, pp. 45-46, 127), informed Lox, in violation of his fiduciary duty to petitioner, that petitioner was not in good shape and would soon fold-up or go broke, that Raney could presently obtain the Fischer franchise and had been promised it, and asked Lox and his partner Otteson to go to work for him when he should obtain the Fischer franchise; whereupon Lox declined to comply with his promise to work for petitioner. Thereupon, with such knowledge that the Fischer franchise might be obtained by others, Lox and Otteson went to Chicago and obtained the Virginia franchise for themselves, reporting to Fischer the

alleged facts stated by Raney, in his effort to sabotage petitioner's employees. Defendants thereupon in April, 1951, with full knowledge of Raney's infidelity and without any inquiry of petitioner, took away from petitioner the Virginia franchise (Tr. pp. 48, 50, 91-2; Pl's. Ex. 46, Raney Tr. pp. 110-113). The Virginia business lost by petitioner represented one-fourth of petitioner's business (Brown dep. p. 37, Brown Ex. 37).

By letter of April 5, 1951, to defendants, petitioner, having learned of Raney's efforts to embezzle its franchise, informed defendants optimistically about its business in the first six months of its life, its efforts to aid its Virginia representatives Lox and Otteson, and inviting defendants' *cooperation*, striving to avoid the loss of its franchise. On the same date petitioner's president telephoned Mathis for the same purpose, but defendants did not mention their purpose to give its franchise to Raney or part of it to Lox and Otteson (Pl's. Ex. 36, Tr. pp. 32-3, 45, 188).

Mathis assumed full responsibility for the foregoing exchange of correspondence between defendants and Raney (Tr. p. 24).

Mathis' alibi that his determination to give petitioner's franchise to Raney was conditional upon the facts about petitioner as reported by Raney being true (Tr. pp. 39, 45, 62-63, 67) was manifestly false and incredible, for defendants never investigated or inquired about such facts and they did not know whether the forebodings of Raney about petitioner would transpire (Tr. pp. 25, 40, 43-44); and defendants had not received any complaint against petitioner (Tr. pp. 29-30). There was no evidence whatever that petitioner was mismanaging the business, and Mathis did not express any dissatisfaction whatever about defendants' relations with petitioner (Tr. p. 189).

Mathis testified that he paid "much attention" to the fact that his correspondence with Raney was addressed from and to Raney's residence (Tr. p. 21). He was thus fully conscious of Raney's infidelity at all times. He freely testified that he knew that Raney was seeking the Washington franchise for "HIS OWN PERSONAL USE" and *that Raney would take with him petitioner's employees* (Tr. pp. 26-28, 30-31).

The three clandestine letters by Raney to defendants did not bear defendants' usual time stamp of their receipt by defendants, thus showing defendants' purpose to regard them as unusual, secret and clandestine communications (Tr. pp. 33-34).

Despite Mathis' knowledge of Raney's wrongful purposes, and defendants' contract commitment to give petitioner "ALL POSSIBLE SUPPORT AND COOPERATION", Mathis had the audacity to deny that he was under obligation to inform petitioner of Raney's clandestine, criminal purposes to embezzle petitioner's franchise, in an obvious attempt to escape civil liability (Tr. p. 53).

Petitioner had been frantic for additional sales power, and the loss of important personnel or exclusive sales territory such as Virginia was extremely damaging to its business (Raney, Tr. pp. 118-119; Ex. 54, Raney, Tr. p. 126).

Raney, while found to be dishonest, was the ablest known person to manage petitioner's business, and his loss to petitioner because of his dishonesty led to the ruination of petitioner's business (Brown dep., pp. 29-30).

Following Mathis' last letter to Raney of April 9, 1951, he in Washington, D. C., sought to meet privately with Raney, and not with petitioner's president, thus concealing his aiding and abetting of Raney to embezzle the franchise (Tr. pp. 89-90, 213-214). But as Raney's co-conspirator

Kane, who had promised Raney the capital, had squealed on Raney, Raney was unable to take the franchise, and accepted a position in Chicago with defendants (Tr. pp. 144, 83). The net result of Raney's infidelity, was the immediate loss of the Virginia franchise, the loss of petitioner's valued employees, the ruination of petitioner's business, and its great damage. The Virginia franchise was lost in early April (coincident with Raney's departure), Raney's services were lost then, Kane's services were lost in July, 1951, and in early 1952 the remainder of the Fischer franchise was lost, all of which was the ruination of petitioner's business (Tr. pp. 183-4, 189-190).

Kane, while a co-conspirator with Raney to embezzle the franchise, had also conspired with Mathis for the procurement of the franchise for himself, in competition with Raney (Miller deposition).

Defendants cancelled petitioner's whole franchise April 25, 1952, and gave it to District X-Ray Company then organized and owned by Kane and petitioner's former service manager (Tr. p. 72), Mathis having sent Raney to Washington for that purpose (Tr. pp. 73-74, 108-110).

After losing Raney and Kane, and the Virginia franchise, petitioner endeavored to sell the business and reduce its losses (Tr. pp. 190-191, 195-6) and was required to sell the business to its only outlet, viz., Kane as its former vice president and co-conspirator with Raney.

Defendant Mathis declined to produce documents required by a *subpoena duces tecum*, and his counsel brazenly declared to the court that he "threw it away" in utter contempt of the process of the court, and without reprimand by the trial judge (Tr. pp. 233-236). If, therefore, it were true (which could not be) that there was insufficient evidence, it was due to the contempt of the court by Mathis, and the trial court's indulgence.

Accountant Rickman analyzed the losses of petitioner from October 2, 1950 through October 18, 1954, and testified that they were $36,592.75 (Rickman dep., pp. 18-27, 31, Exs. 16, 16A; Benton, Tr. p. 251).

The foregoing facts were conclusively proved by the evidence, and doubly confirm the actional wrongs committed by defendants as shown alone by the findings of facts by the Court of Appeals, whose legal conclusions are contradictory thereof.

REASONS FOR THE ALLOWANCE OF WRIT.

The decision below totally disregards fundamental principles of law and equity, and is based solely and erroneously on applied philosophy and psychology.

The decision below is repugnant to the controlling decisions of this court, and other United States Courts of Appeal, and established decisional law.

The Court of Appeals so far departed from the accepted and usual course of judicial proceedings, as to require the exercise of this court's power, to prevent a travesty upon justice.

ARGUMENT.

I. The Legal Conclusion That There Is No Evidence That Defendants Breached Their Contractual Obligations to Petitioner Is Contradictory of All the Facts So Clearly Found by the Court of Appeals; and It Is Erroneous, Incredible, Inexplicable, and Untrue.

Defendants' contractual obligation to give petitioner as its sales agent "ALL POSSIBLE SUPPORT AND CO-

OPERATION" is undisputed. Defendants' conniving clandestinely with petitioner's vice president-manager-fiduciary to enable him to embezzle petitioner's franchise and appropriate petitioner's employees violated that business obligation, and violated every moral concept known to man.

Defendants not only violated their contractual obligation to petitioner, but they were engaged in the perpetration of a fraud on petitioner, by their clandestine conduct and their failure to disclose Raney's purposes to petitioner under their obligation to give "all possible support and cooperation" to petitioner. The law is stated in 17 *Corpus Juris Sec.*, Sec. 155, Contracts, p. 508:

> "The rule that nondisclosure of facts does not constitute fraud does not apply where there is an active concealment of facts. *This is a fraud.*"

The dishonest actions of defendants in aiding and abetting Raney to embezzle petitioner's property, as evidenced conclusively by their correspondence, prove beyond a possibility of doubt the guilt of defendants in breaching their contract.

The court's conclusion that there is no evidence of such breach of contract is simply untrue and grossly erroneous.

So long as petitioner was discharging its contract with defendants, defendants owed petitioner under its obligation to give it "all possible support and cooperation" the implicit, reciprocal duty not to do anything that would hurt petitioner in the enjoyment of those rights. Defendants violated that contract with impunity, and participated with Raney in his fraudulent purposes.

Defendants' active participation in Raney's attempted embezzlement of petitioner's property was a merciless, immoral, and unconscionable violation of their contractual

obligation. 17 *Corpus Juris Sec.*, Sec. 328 on Contracts, states the rule:

> "A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used, and terms which may be clearly implied from a consideration of the entire contract are as much a part thereof as tho plainly written on its face. In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract *to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract.*"

Instead of complying with their contract with petitioner, defendants actually supported and cooperated with Raney to betray his trust and to embezzle petitioner's property. That was an unconscionable breach of their contractual commitment to lend all possible support and cooperation to petitioner.

II. The Legal Conclusion That There Is No Showing That Defendants Interfered with Raney's Contractual Commitment to Petitioner or That Defendants Knew Anything About the Terms of Such Agreement, Is Erroneous, Incredible, Inexplicable, and Untrue, As Shown by the Facts.

Such legal conclusion is in direct contradiction of the sordid facts found by the court, as confirmed by the further facts not mentioned by the court, but proved by the uncontradicted evidence—all as hereinabove shown.

The facts above shown prove conclusively that defendants' breach of their contractual commitment to petitioner aided and abetted Raney and made possible his purposes

to embezzle petitioner's franchise, with full knowledge of Raney's fiduciary obligations to petitioner alone; and, except for defendants' cooperation with Raney, Raney could not have embarked upon such dishonest purposes.

The agreement of defendants to give petitioner's franchise to Raney was a common fraud upon petitioner, and was a malicious interference with petitioner's contract with Raney as its vice president. 17 *Corpus Juris Sec.*, Contracts, Sec. 198, p. 550, states the rule:

> "Contracts, the object or tendency of which *is to constitute a fraud or breach of trust or breach of duty* on the part of one who stands in a fiduciary or confidential relation, *are illegal and void*, as constituting or tending to constitute, a fraud on third persons."

As it was Raney's duty to petitioner to preserve and protect petitioner's franchise, which knowledge was conclusively chargeable to defendants, their agreement with Raney, during the term of their contract with petitioner and the term of Raney's with petitioner, to take the franchise from petitioner and give it to Raney was a brazen, unlawful, fraudulent and merciless interference with the Raney contract with petitioner, which directly caused the loss by petitioner of its contract rights with Raney.

Without defendants' willing aid, cooperation, clandestine involvement and commitment to Raney while he was petitioner's vice president and manager, it would have been impossible for Raney to perpetrate the embezzlement of petitioner's property and the sabotaging and attempted stealing of petitioner's employees. Defendants clandestinely gave Raney, instead of petitioner, their full cooperation and support in violation of their express, written contract with petitioner.

Such conduct was an illegal interference with petitioner's contract rights with Raney, and such conduct destroyed such contract.

All parties who wrongfully induce a breach of contract are jointly and severally liable, and malice does not necessarily mean actual malice "but the intentional doing of a wrong act without legal or social justification". Intentional interference is sufficient. *Hornstein* v. *Podwitz*, 254 N. Y. 443, 173 N. E. 674; *Kervozky* v. *Lorber*, 290 N. Y. 279, 49 N. E. 2d 146, 147. To recover against one tortiously inducing the breach of his contract, it is not necessary to show that the party breaching the contract is insolvent or could not otherwise respond to a judgment (as Raney is doubtlessly here unable to respond to a judgment); the liability is joint and several. *Simon* v. *Noma Electric Corp.*, 293 N. Y. 171, 56 N. E. 2d 537; *Rosenberg* v. *Weisberger et al.*, 200 Misc. 198, 108 N. Y. S. 2d 962; *Louis C. Moser & Co., Inc.*, v. *Kreger*, 80 N. Y. S. 2d 199. Petitioner is not limited in the assertion of its rights as against the contract breaker Raney, for all parties who induced the breach of contract are jointly and severally liable. *Hornstein* v. *Podwitz*, 254 N. Y. 443, 173 N. E. 674.

III. The Court's Holding That the Suit Was Brought Against the Wrong People, Instead of Against Raney, Is Palpable Error.

The first cause of action is for defendants' breach of their contract with petitioner. Such facts are clear. Defendants are liable for their breach of their own contract—and no one else is.

It was defendants' tortious conduct that interfered with and made possible Raney's breach of his contract with petitioner. It was defendants' conduct and aid to Raney that induced Raney's breach of his contract with petitioner.

It is Hornbook law that an aggrieved party is not compelled to sue all tort feasors. He may sue one or more or all of them at his discretion. *Robert Music Corp.* v. *Alamo Music, Inc.*, 119 F. Supp. 29 (S. D. N. Y.).

The Illinois authority is *Hays* v. *Borders*, 6 Ill. 46, 65 (1844), which said:

> "The tort feasor is responsible for all the consequences growing out of his wrongful act; *Hewitt* v. *The Ontario Copper Lighting Rod Co.*, 44 U. C. Q. B. 287, 290 (1879). *The measure of damages is not confined to the loss of the services of the servant enticed away. The jury are justified in giving ample compensation for all the damages resulting from the wrongful act.*"

Where the tort was intentional, as in this case, the tort feasor's liability "is extended to include all the damages towards which his tort was the contributing cause." (*Columbia Law Review*, Vol. XXX, Feb., 1930, No. 2, p. 236. The same article holds (p. 237):

> "Most courts have held that the plaintiff in an action for wrongfully inducing breach of a contract can recover punitive damages; often granting a larger sum for punitive damages than the total amount of compensatory damages recovered." (Citing many cases).

It holds further that (p. 239):

> "The few cases which have considered the question have held that a person who has been wrongfully deprived of a contract is under no duty to the tort feasor to mitigate the damages." (Citing many cases).

Yet here, petitioner sought in every way to mitigate the damages, by attempting to sell the business at the earliest possible opportunity, and, meantime, to operate the business the best it could, with loss of competent management.

IV. Having Conspired with Petitioner's Fiduciary, Raney, in His Attempted Embezzlement of Petitioner's Property, Defendants Are Liable for Petitioner's Losses.

Defendants are liable jointly and severally for losses resulting from their conspiracy to defraud petitioner of its franchise and employees involving breaches of fiduciary duties by petitioner's officer and partner, Raney, and dealings with the fiduciary with knowledge of his wrongdoing: *Corpus Juris Sec.*, Vol. 15, pp. 996, 1004; *Jackson* v. *Smith*, 254 U. S. 586, 65 L. Ed. 418; *Irving Trust Co.* v. *Deutsch*, 73 F. 2d 121, cert. denied 294 U. S. 709; *Woodenware Co.* v. *U. S.*, 186 U. S. 279, 46 L. Ed. 1164; *Crites* v. *The Prudential Ins. Co.*, 322 U. S. 408, 64 S. Ct. 1075, 88 L. Ed. 1356; *Russel* v. *Post*, 138 U. S. 425, 34 L. Ed. 1009, holding that liability definitely attaches to one knowingly lending his aid in any way to the perpetration of a fraud. *Kernan* v. *Humble*, (La. 1899) 25 So. 431.

Perhaps the leading case on breach of fiduciary duty is *Meinhard* v. *Salmon*, 249 N. Y. 458, 468, holding that "not honesty alone, but the punctilio of honor the most sensitive is then the standard of behavior" of fiduciaries (Justice Cardoza). See also *Pratt* v. *Shell Petroleum Corp.*, 100 F. 2d 883, 22 F. Supp. 304. And if two inferences may be drawn as to whether the conduct of the agent was to the damage of his principal the inference that it was will be made. *Ashman* v. *Miller*, 101 F. 2d 85.

Duane Jones Co. v. *Burke*, 121 N. Y. S. 2d 107 (1953), is a decision nearly in point. It held that employees of a company who started their own business by a new agency, and took plaintiff's customers and breached their fiduciary duties were liable to plaintiff for loss of profits and recognized that a third person (such as defendants here) are

liable if they participate in inducing the breach of contract, especially where animated by constructive malice.

CONCLUSION.

The decision of the Court of Appeals is barren of reason. It is barren of legal or equitable authority. The legal conclusions are contradictory of the facts found. The decision is based solely on the judges' idea of philosophy and psychology.

The decision is repugnant to fundamental principles of law and equity. It attempts to insulate it from attack in this court by the broad statements, in contradiction of facts freely found, that "we find no evidence", "there is no showing", "we find no evidence of any conspiracy"—all in contradiction of the facts it found.

The decision concludes with the irrational, erroneous statement that petitioner should have sued Raney—not the defendants as the contract breaker, and not the co-tortfeasor, the defendants.

And then the Court of Appeals indulges the palpably erroneous ideology that petitioner's president and counsel necessarily appeared as a witness for petitioner, as if that were wrong. It was essential that petitioner's counsel should testify, and a litigant's counsel may testify just as freely as the litigant himself. *Hiram M. French* v. *Assyria Hall*, 119 U. S. 152, 30 L. Ed. 375 (1886).

The decision of the Court of Appeals, without reason or authority, is a travesty, and the fair administration of

justice compels the review and reversal of the unsupported, and unsupportable judgment, as matter of *law*.

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 12087 SEPTEMBER TERM, 1957, JANUARY SESSION, 1958

BOOMHOWER, INC.,
Plaintiff-Appellant
v.
H. G. FISCHER & CO., INC.
and
ALAN MATHIS,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 24, 1958

Before MAJOR, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

HASTINGS, *Circuit Judge.* Plaintiff, Boomhower, Inc., a Delaware corporation dealing in medical equipment, brought this action for damages against defendants, H. G. Fischer & Co., Inc. (Fischer), an Illinois corporation which manufactures and supplies such equipment, and Alan Mathis (Mathis), its president; the damages having allegedly resulted from breaches of a contract whereby plaintiff was appointed as the exclusive sales representative of the corporate defendant in the distribution of its products in Washington, D. C. and at least parts of Virginia and Maryland. The case was tried to the court without a jury, and at the conclusion of plaintiff's evidence, on defendants' motion, the court below entered its finding and judgment favorable to defendants, from which plaintiff now appeals.

Prior to October, 1950, D. W. Boomhower & Co., a business privately owned by D. W. Boomhower, acted as sales representative of Fischer in the above-mentioned area. About October, 1950, one T. G. Benton, a lawyer, organized the plaintiff corporation with his own capital and purchased the business and assets of Boomhower & Co. Benton was president of his new corporation, and Boomhower, the former proprietor, and Ed M. Raney were vice-presidents. Benton was without experience in this line of business and placed Raney in full charge of plaintiff's operations.

On October 6, 1950, Boomhower, as vice-president of plaintiff, wrote a letter to Fischer, directed to the attention of Mathis, informing them of the incorporation of plaintiff, its purchase of the Boomhower Co. business, giving the names of the officers with an account of Benton's personal background, stating that Raney would remain in full charge of the business, and requesting Fischer to write plaintiff assuring it of the continuation of "our Sales Franchise with you and your continued support and cooperation." This letter was supplemented by a second letter (undated but written about the same time) from Boomhower to defendants requesting assurance of the same dealer and cash discounts as under the former ownership, and that future advertising sent out by Fischer for this territory be under plaintiff's name.

On October 12, 1950, Fischer through Mathis as president acknowledged receipt of these two letters, offered its congratulations and best wishes for success and wrote further that "[w]e certainly expect to extend to Boomhower, Inc. all possible support and co-operation and extend to them the same discounts and terms that we have extended to D. W. Boomhower Co." Acting on this exchange of letters the parties continued the supplier-dealer arrangement

that had previously existed between Boomhower individually and Fischer. There was no formal assignment of the original contract between Boomhower & Co. and Fischer.

Sometime later (probably in March, 1951) Ed Raney wrote to defendants from his home address and referred to a conversation he had had with Mathis in Chicago in January, 1951, in which Raney had intimated that the Boomhower situation might not be satisfactory and had inquired about the possibility of taking over the Fischer franchise exclusively in the Washington, D. C. area. He wrote further that Benton had no conception of the business and had created dissension among the salesmen. He went on to say he could see a complete disintegration of the sales organization and that he thought he could take a key man or two and double the Fischer business in that area. He concluded by stating that he had available capital to handle the business and inquired whether he might have the territory exclusively for himself and take it away from the present arrangement. Raney prefaced his letter with a request that it be considered as completely confidential and at the end asked that the reply be sent to his home address.

Under date of March 27, 1951, Fischer through Mathis as president replied to Raney at his home address in Washington, D. C. to the effect that "[*i*]*f, as you state in your letter,* it appears that Boomhower, Inc. as it is presently set up bids fair to disintegrate as a proper sales force for our line and you feel that you can take over our line advantageously yourself, we, of course, are agreeable to turning our representation over to you * * *." (Our emphasis.) The letter went on to describe possible territory and concluded by saying that Fischer "will be ready to proceed along the line under discussion when we hear further from you." Raney replied on March 31, 1951, making mention of territory and inquiring about notice of cancellation to plain-

tiff, "which is only fair * * *. I certainly do not wish it to be said at any time that there was any 'scullduggery' [*sic*] in the transaction."

Raney wrote to defendants again on April 5, 1951, that "[t]his affair has become an open brawl!", discussing his sharp differences with Benton, and once more asking that the letter be kept confidential. On April 9, 1951 defendants replied that they would consider Raney for certain territory in and around Washington, D. C. and that they would want to give plaintiff about one month's notice of cancellation. In the meantime, on April 1, 1951, Raney wrote to D. W. Boomhower personally in Florida, mentioning his hostile attitude toward Benton (referring to him as "the Attorney"), and inviting Boomhower to furnish $5,000 capital for a new corporation Raney proposed to form and personally control to take over the Fischer business from plaintiff. However, Boomhower declined to participate.

About this time Benton demanded that Raney "turn in his keys" and on April 11, 1951 Raney resigned and left plaintiff's service and shortly thereafter went to work for Fischer. Dennis Kane succeeded Raney with plaintiff and worked until late July, 1951. Kane was followed in order by two of plaintiff's salesmen and none of them appears to have been successful. Plaintiff continued to represent Fischer and subsequently the parties executed a formal contract effective October 5, 1951. Finally Fischer canceled plaintiff's contract on April 25, 1952.

It appears that Raney could not raise capital to organize his proposed dealer corporation and Fischer never granted him any franchise. Plaintiff was succeeded as the Fischer dealer by the District X-Ray Company headed by Kane and others.

Plaintiff seeks to recover $36,592 as damages under three separate and alternative theories or causes. The first

cause charges that defendants breached the Fischer contract with plaintiff by conniving with Raney in his attempt to appropriate the franchise for his own use. The second cause charges that defendants maliciously interfered with Raney's three-year contract of employment to manage plaintiff's business. The third cause is in trespass on the case charging that defendants conspired with plaintiff's fiduciary (Raney) to take away its property rights under its contracts with Fischer and give them to Raney.

Since the court below sustained defendants' motion for a finding in their favor at the close of plaintiff's evidence, the contested issues here relate primarily to the sufficiency of the evidence: Whether it establishes a breach by defendants of any contractual duties owed by them to plaintiff, and whether it sustains plaintiff's claim that defendants deliberately interfered with the contract of employment between plaintiff, as employer, and Raney, as employee, or conspired with Raney to enable him to embezzle plaintiff's franchise.

After an examination of the entire record we are satisfied that the evidence is wholly insufficient to sustain plaintiff on any of its theories of recovery. In this connection it should be pointed out that plaintiff has sued Fischer and its president, Mathis, and has elected not to sue Raney. We find no evidence that defendants breached any of their contractual obligations to plaintiff as defined either in the October, 1950 exchange of letters or as formally set out in the contract of October, 1951. Likewise, there is no showing that defendants interfered with Raney's contractual employment with plaintiff, or that defendants ever knew anything about the terms of any such agreement. Similarly, we find no evidence of any conspiracy between defendants and Raney to enable Raney to embezzle plaintiff's franchise and steal plaintiff's employees. It is quite apparent

from the transcript of these proceedings that Raney and plaintiff had an unhappy and unprofitable alliance. It is also clear that Raney wanted the franchise for himself, but defendants never gave it to him. Raney did leave plaintiff and take employment with defendants but only after Benton asked for his keys. The district court aptly said, "It would appear to me that this lawsuit has been brought against the wrong people."

This would appear to be one of those unfortunate situations where a lawyer puts his money into a business in which he has had no experience; has an unhappy result and at least four unsuccessful managers; concludes he has been defrauded by a trusted associate but sues someone else; acts as trial and appellate counsel for his own plaintiff corporation; and feels compelled to testify as a witness in his own behalf. It all adds up to a situation to which he can never become reconciled.

Since this appeal turns solely on the sufficiency of the evidence and having found against appellant on that issue, we hold that the district court did not err in its finding favorable to defendants.

The judgment below is

AFFIRMED.

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Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 935

BOOMHOWER, INC.,

Petitioner,

vs.

H. G. FISCHER & CO., INC. and ALAN MATHIS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED.

Essentially, only one question is presented: did the Courts below err in determining that plaintiff's evidence was insufficient to sustain its claim?

STATEMENT OF THE CASE.

This suit, filed by the petitioner, Boomhower, Inc., a Delaware corporation, against respondents H. G. Fischer & Co. Inc., an Illinois corporation, and Alan Mathis, President of the latter corporation and a resident of Illinois, is an ordinary action predicated upon alleged breach of contract and tortious wrong. Except for the diversity of citizenship of the parties, the District Court would have

been without jurisdiction and the cause would have been triable only in a State Court. The case was tried in the District Court without a jury and, at the conclusion of the plaintiff's evidence, on motion of respondents which challenged the sufficiency of the plaintiff's evidence, the Court entered a finding for respondents and dismissed the action.

The Court of Appeals reviewed the record and stated:

> "After an examination of the entire record, we are satisfied that the evidence is wholly insufficient to sustain plaintiff on any of its theories of recovery." (Pet'n A-5)

For some time prior to October, 1950, D. W. Boomhower was a dealer in medical equipment in Washington, D.C. and acted as sales representative for various manufacturers of such equipment, including the respondent, H. G. Fischer & Co. Inc. of Franklin Park, Illinois. During October, 1950, T. G. Benton became interested in said Washington dealership business and caused the petitioner corporation to be organized for the purpose of acquiring and operating said business. On October 6, 1950, petitioner by letter notified respondents that the Washington dealership business had been transferred to it and assured respondents that there would be no material changes in operational details. By this letter respondents were requested to assure petitioner of the continuation of "our sales franchise with you and your continued support and cooperation." (Pltf's App. 14, 15).

A second letter was written by petitioner to respondent H. G. Fischer & Co. Inc., requesting assurance that the same dealer and cash discounts on all invoices would be allowed as under the old individual ownership, and also

that all advertising sent out by the factory for "our territory" would be under the name of Boomhower, Inc. (Petnr's App. 17, 18).

Respondent H. G. Fischer & Co. Inc. replied to the foregoing letters on October 12, 1950 by assuring the petitioner of the same discounts and terms that had theretofore been extended to the individual proprietorship and also assured petitioner of respondent's support and cooperation. The D. W. Boomhower business acquired by petitioner had operated under "a regular sales contract" with respondent H. G. Fischer & Co. Inc., embracing Washington, D.C. and certain counties in Virginia and Maryland contiguous to Washington. Respondents were first informed of the transfer of the Boomhower & Company proprietorship business to petitioner corporation by the letters above mentioned. (Defts' App. 1).

Respondent Alan W. Mathis, President of H. G. Fischer & Co. Inc., assumed that the purpose and effect of the exchange of letters between petitioner and respondent H. G. Fischer & Co. Inc. was to substitute petitioner as a party to existing "regular" sales contract in lieu of D. W. Boomhower, proprietor of the former Boomhower & Company business. (Defts' App. 2).

Subsequently, Ed Raney, a Vice President of petitioner, who formerly had been employed by D. W. Boomhower, addressed a letter to respondent Alan W. Mathis in which Raney stated that Mr. Benton appeared to have no conception of the surgical trade and had created a lot of dissension among the salesmen. By this letter Raney envisioned the complete disintegration of petitioner's sales organization and inquired whether Raney might hope to acquire the territory. (Pltf's Exh. 30).

Respondent H. G. Fischer & Co. Inc., under date of March 27, 1951, replied to Raney's letter as follows:

> "If as you state in your recent letter, it appears that Boomhower, Inc. as it is presently set up bids fair to disintegrate as to a proper sales force for our line and you feel that you can take over the line advantageously yourself, we, of course, are agreeable to turning over our representation to you." (Pltf's Exh. 31).

Later, under date of April 5, 1951, Ed Raney again wrote to respondent Mathis and described the dissension in the Washington dealership as an "open brawl." (Pltf's Exh. 33).

On April 9, 1951, respondent H. G. Fischer & Co. Inc. replied to the foregoing letter indicating that it would consider Raney for certain territory including Washington, after giving petitioner required notice. (Pltf's Exh. 34).

Respondent Mathis, called by petitioner as a witness, testified that the consideration given Raney with respect to the territory in question was subject to various "ifs," the "ifs" being: "if Boomhower, Inc. went to pots. If you lost all your sales force, and those things that he had mentioned," and further, "if your business dropped off to the point where we could no longer do justice to the company by continuing to do business with you, why, then I would have done it. I have got duties to the company." (Defts' App. 3).

Respondent Mathis, as petitioner's witness, further testified that there were a lot of "ifs" which never materialized and that Raney never had a franchise from H. G. Fischer & Co. Inc. in that territory. A new regular form of contract was submitted by respondent H. G. Fischer

& Co. Inc. to petitioner in October of 1951, which contract was subsequently cancelled on April 25, 1952. (Defts' App. 5). Thereafter, the franchise for the Washington area was given to District X-Ray Company. (Defts' App. 5, 6).

Respondents were informed by petitioner's letter of October 6, 1950, that the officers of the new corporation were: T. G. Benton, President; D. W. Boomhower, Vice President; Ed M. Raney, Vice President; and F. Benton, Secretary-Treasurer. Thus respondents were aware that Ed M. Raney was a corporate officer of the petitioner corporation but had no knowledge of an alleged "profit-sharing" contract of employment between petitioner as employer and Raney as employee. (Defts' App. 2).

Petitioner's attorney sought to introduce in evidence a purported letter of application for employment by Raney but, in response to an inquiry by the trial judge, stated that he did not believe the respondents knew about the application, whereupon the Court ruled the instrument inadmissible. (Defts' App. 10).

Ed Raney testified that he had determined to quit his employment with petitioner prior to writing Mr. Mathis and that his employment was actually terminated after the receipt by him of a letter from Mr. Benton materially curtailing his authority as an employee. Raney further testified that Mr. Benton had accused him of a lot of things and demanded the keys which he, Raney, thereupon threw upon the desk and then walked out. Later, Raney wrote a formal resignation as Vice President of the petitioner corporation, which was accepted. (Defts' App. 11).

In addition to the products of respondent H. G. Fischer & Co. Inc., petitioner handled medical and surgical instruments and equipment produced by other manufacturers,

including Hamilton Furniture, electric cardiogram and basal metabolism equipment, an item known as a microtherm, and an extensive laboratory line. (Defts' App. 12).

Mr. Thaddeus G. Benton, attorney for petitioner, sworn as a witness in petitioner's behalf, testified that Raney had misrepresented to him the profits and earning power of the Company under Raney's management, that he found Raney was totally unreliable as a manager, that Raney was not to be trusted in a managerial capacity, but that "we could control him strictly as a salesman and we needed his sales power." (Defts' App. 12, 13).

Mr. Benton further testified that he made no investigation as to the relation between the company he was buying and respondent H. G. Fischer & Co. Inc.; that he accepted Mr. D. W. Boomhower's—Ed Raney's promises to him in that respect and that he never saw any written contract there might have been. (Defts' App. 14). With respect to the occasion when Raney surrendered the keys, Mr. Benton testified that he said, "let's have the keys," and that Raney gave him the keys. (Defts' App. 14).

ARGUMENT.

I.

NO QUESTIONS OF LAW, EITHER STATE OR FEDERAL, ARE INVOLVED.

The Courts below were presented with one question only, namely: the sufficiency of petitioner's evidence to sustain his contentions. Both Courts performed this function in accordance with the accepted and usual course of judicial proceedings, and both Courts, after carefully analyzing the evidence, determined that it was inadequate.

The opinion of the trial judge, orally expressed, and the opinion of the Court of Appeals, definitely show that neither Court was presented with any substantial question of law but that the case as submitted required only that the evidence be considered and analyzed with regard to its sufficiency. The District Judge, who presided over the trial without a jury and who saw and heard the witnesses, determined that question adversely to petitioner, and the Court of Appeals, in an opinion indicating a careful study of the record, concurred in the trial court's decision.

Under the circumstances, petitioner is not in position to contend that the lower Courts erred in deciding any question of law or in the application of any settled proposition of law.

II.

THE COURTS BELOW CORRECTLY APPRAISED PETITIONER'S EVIDENCE AS INSUFFICIENT TO SUPPORT ITS CLAIM.

At the conclusion of the evidence, the District Court remarked:

> "It would appear to me that this law suit has been brought against the wrong people."

and this remark by the District Court was characterized by the Court of Appeals as an apt observation. (Pet'n A-6). The Court of Appeals further stated:

> "This would appear to be one of those unfortunate situations where a lawyer puts his money into a business in which he has had no experience; has an unhappy result and at least four unsuccessful managers; concludes he has been defrauded by a trusted associate but sues someone else; acts as trial and appellate counsel for his own plaintiff corporation; and feels compelled to testify as a witness in his own behalf. It all adds up to a situation to which he can never become reconciled." (Pet'n A-6)

The evidence abundantly supports the foregoing view reached by both the District Court and the Court of Appeals.

It is regrettable that the venture of Mr. Thaddeus G. Benton into the highly specialized medical equipment business, in which he had no previous experience, should have proved unsuccessful. However, his disappointment, and the apparent bitterness engendered by the episode, does not excuse petitioner's efforts to recover its alleged losses from respondents, who were in no way responsible for the failure of petitioner's business.

At the outset, Benton appears to have recognized the necessity of retaining employees experienced in the medical equipment field but, according to Raney, Benton inaugurated policies and methods which were not suitable to the conduct of the business which catered to members of the medical profession and hospitals. It is also clear that Benton failed to establish and maintain harmonious

relations not only with Raney, whom he regarded as a key man, but with members of petitioner's experienced sales force. As the dissension between Benton and his sales force increased, petitioner's sales naturally declined until the operation of the business ceased to be profitable. Respondents, as suppliers of medical equipment, were not concerned with the management or internal affairs of the petitioner corporation and did not interfere or attempt to interfere with petitioner's relations with its employees.

Raney, petitioner's Vice President, apparently apprehensive of his own future, reported a chaotic state of affairs in petitioner's organization to respondents and, upon the basis of such representations, suggested that respondents transfer the Washington franchise to him. Since respondents' legitimate business interests in the Washington territory were involved, respondents tentatively considered Raney's report. Respondents, however, did not cancel petitioner's franchise as requested by Raney, and although respondents later found it necessary to cancel the franchise, the Washington territory was not given to Raney but to a corporation with which Raney had no connection.

Although petitioner asserts that Raney, by reason of his prior experience and good record in the medical equipment field, was more or less indispensable to the success of petitioner's business, Benton himself testified that he discovered Raney lacked managerial capacity and that he therefore had employed another manager and sought to reduce Raney to the status of salesman. It appears that Benton's decision to remove Raney as manager and retain him in the capacity of a salesman resulted in a controversy between Benton and Raney during which Raney was discharged. Some time after Raney was so discharged, he

was employed by respondent H. G. Fischer & Co. Inc. in a capacity which had no connection with the Washington territory. It is therefore definitely established by the evidence that Raney was discharged by the petitioner and that petitioner's claim that it was deprived of Raney's services by reason of respondents' interference is unfounded.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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